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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

DISTRICT OF COLUMBIA,

(GENERAL TERM,)

AT THE

APRIL AND SEPTEMBER TERMS OF 1873,
AND AT THE JANUARY, APRIL, AND
SEPTEMBER TERMS OF 1874.

BY

ARTHUR MACARTHUR,

ASSOCIATE JUSTICE.

#5

W. H. & O. H. MORRISON, BOOKSELLERS:
WASHINGTON,
1875.

Rec. Oct. 21, 1875

LIST OF OFFICERS
OF THE
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

J U S T I C E S .

DAVID K. CARTTER	CHIEF JUSTICE.
ABRAM B. OLIN	} ASSOCIATE JUSTICES.
ANDREW WYLIE	
DAVID C. HUMPHREYS	
ARTHUR MACARTHUR	

GEORGE P. FISHER U. S. DISTRICT ATTORNEY.
CAMPBELL CARRINGTON . . . ASSISTANT U. S. DISTRICT ATTORNEY

RETURN J. MEIGS CLERK.

ROBERT LEECH* AUDITOR.

ALEXANDER SHARP U. S. MARSHAL.
GEORGE W. PHILLIPS U. S. DEPUTY MARSHAL.

J. SAYLES BROWN REGISTER IN BANKRUPTCY.

AMOS WEBSTER REGISTER OF WILLS.

* The death of Mr. Leech has occurred since these reports were completed and Hon. Thomas Hood has been appointed in his place.

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P R E F A C E.

The Supreme Court of this District is organized by the act of March 3, 1863, and is the only court of original and superior jurisdiction, for local purposes, at the seat of the General Government. In addition to the powers and jurisdiction of a circuit and district court of the United States, it has general jurisdiction in law and equity; it can also proceed in all common-law and chancery causes instituted before it, in which either of the parties reside without the District, as was done in the supreme court of chancery in the State of Maryland on the 3d day of May, 1802. It has also power, at the general terms, to hear and determine all appeals from the decisions of the Commissioner of Patents, where the party appealing is dissatisfied with the action of the Commissioner. It exercises the powers and duties of the late orphans' court, and administers the estates of deceased persons; and it holds terms for the trial of all crimes and offenses arising within the District. The proceedings in the police court and before justices of the peace may also be removed into the supreme court by appeal for final determination, and it is the only local tribunal in the District having original power to issue the writ of mandamus to heads of Departments and other inferior officers in regard to the performance of ministerial duties.

To this court is intrusted the execution of the laws which protect the officers of the General Government, the representatives of the people in both branches of Congress, the employés in the various Departments, as well as the citizens from every part of the country who visit the capital either from motives of business or inclination.

The law, equity, and criminal business of which the court has cognizance, is transacted at special terms, held by a single justice; and any party aggrieved by the order, judgment, or decree pronounced at such terms may appeal therefrom to the general term, held by all the justices, or three of them at least, sitting in banc.

In view of this extended jurisdiction, there arises a necessity that the law as decided should be preserved, and some means adopted by which it may be known. No provision has been made for reporting the decisions of the general term, and, consequently, no attempt has been made to furnish them in any manner either to the bar or the community. Indeed, there have been no reports of judicial proceedings in this jurisdiction since those of Judge Oranch were brought to a close in 1840. And yet all will acknowledge that next in importance to a right determination is a full and accurate knowledge of the reasons which justify it. Without this advantage the law is uncertain, and subject to fluctuations from which even the court cannot protect itself.

To supply this want I have undertaken the task of reporting the current decisions of the court in banc; and the present volume contains every case in which any point of interest has been passed upon from the April term in 1873 to the September term in 1874, both inclusive.

I have adopted the method which generally prevails in modern reports, of which, perhaps, there is no better example than those of the Supreme Court of the United States, by Mr. Wallace. First in order is the syllabus, upon which I have bestowed the most diligent consideration, that it may accurately set forth the real points in the decision. This is followed by a statement in which is arranged every material fact necessary to understand the cause; but when the case is stated fully in the opinion of the court, I have not thought it proper otherwise to present the facts. The briefs and arguments of counsel are then given, when they are not entirely omitted. The rule of court requiring printed briefs has been of great advantage, and the care and learning with which they are generally prepared entitle them to greater space than I have been able to give them, without inconveniently swelling the volume. My only regret is that I have been so restricted in the use of these admirable productions; for as a means of reference they confer a substantial benefit upon the profession.

Where the opinion was delivered in writing, it is given in full; and in the case of oral decisions, care has been taken to conform the report to the absolute point in judgment.

It has been my constant aim to make the reports in every

case as full and authentic as my opportunities of sharing in the labors of the court would permit, so that there might be no reason to complain of error or mistake. I am conscious, however, that the work is imperfect; and any suggestion to improve it will not only be appreciated, but appropriated to the benefit of the next volume.

I desire to acknowledge the liberality of counsel in furnishing me with copies of records and briefs, and also the kindness of the clerk's officers in searching the files for the material necessary to make the work complete. My thanks are especially due to Mr. Barnard for numerous transcriptions from his short-hand notes of oral opinions.

In conclusion, I have only to add that the cases reported in this volume which have been reversed in the Supreme Court of the United States down to this date, will be found at the end of the table of cases.

ARTHUR MACARTHUR.

WASHINGTON, *June*, 1875.

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REPORT OF CASES
DECIDED BY
THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
AT APRIL GENERAL TERM, 1873.

CHILD vs. TRIST.

IN EQUITY.—No. 2365.

- I. An attorney or counselor at law who successfully prosecutes a private claim against the United States, for a contingent fee of the amount allowed, has a lien upon the fund which may be enforced against the claimant, even when the money is in the Treasury of the United States.
- II. A contract to prosecute such claim before Congress is not void as against public policy, when the services are to be rendered in an open and fair presentation of facts, and where no secret or corrupt means are employed to mislead or deceive the members of the legislative body.
- III. Nor does such an agreement operate as a transfer or assignment of a part, or interest in the claim, so as to make it void by the provisions of the act of Congress of February 26, 1853. It is a method of fixing the compensation in procuring the allowance of the claim.

STATEMENT OF THE CASE.

It appears from the pleadings and proofs in this case that the defendant, in the month of December, 1869, employed Linus Child, who was an attorney and counselor at law, doing business in the city of Boston, to present and prosecute a claim against the United States Government for services he had long previously rendered in negotiating a treaty with the Mexican government, known as the Guadalupe Hidalgo treaty; and he agreed to pay said Linus Child a fee of twenty-five per centum of all money that should be allowed him by Congress, or paid him by the Government. At the time Linus Child was employed by the defendant, the plaintiff

Child vs. Trist.

iff, who is his son, was in copartnership with him as attorneys and counselors at law, and had a joint interest in his father's business.

On the 27th of August, 1870, Linus Child died, and the plaintiff became his executor, and continued to prosecute the claim, with the knowledge and consent of the defendant, until the 20th day of April, 1871, when an act of Congress was passed providing for the payment to said defendant of the sum of \$14,559.90.

The services in prosecuting said claim were rendered in a fair, open, and honorable presentation of facts to the members and committees of both Houses of Congress, and no means were employed to mislead or deceive them. The defendant has refused to pay the plaintiff on his own account, or as representative of the said Linus Child, the twenty-five per centum of the sum so appropriated; and the money, or some part of it, is still in the Treasury of the United States. The defendant resides in Alexandria, has no other property in this District, and is insolvent.

The prayer of the bill is that the defendant may be restrained from withdrawing the money from the Treasury until he complies with his said contract, and for a decree of payment.

This case was before this court at a former term, on a demurrer filed to the bill, and it was then decided that, according to the allegations of the bill, the agreement was for a contingent fee, and the services performed in a fair and open representation of the claim, which were admitted by the demurrer, and that such agreement was not void as being against public policy; nor was it such a transfer of the claim as to make it void by the provisions of the act of Congress of February 26, 1853.

The cause is now heard on pleadings and proofs in the first instance at the general term.

B. F. Butler and *R. D. Mussey*, for complainant, cited:

Wylie vs. Coxe, 15 How., 415; *Painter vs. Drum*, 40 Penn. State, pp. 467, 470.

Child vs. Trist.

Thomas J. Durant for defendant :

1st. The court has decided, upon the demurrer, that the agreement was not an assignment. *Painter vs. Drum*, 4 Wright, 470. We now argue there can be no lien on the fund, for the services were not those of an attorney and counselor at law. That a lawyer has a lien for services in a cause in court, (see *Paschal's Case*, 10 Wall., 483,) but it cannot be inferred that such a lien exists on money in the Treasury of the United States, in favor of one who renders the services of a non-professional agent.

2d and 3d. The agreement of defendant was with Child, the father, alone, and not with the firm, and was therefore terminated by the death of the party.

4th, 5th, and 6th. On the whole case the decree of the court should be to dismiss the bill.

At the conclusion of the argument the judges delivered oral opinions. But a brief outline only can be given of the grounds of the decision.

The COURT, in substance, held :

That while all contracts to procure or influence legislation by secret means, or by any method likely to mislead or deceive members of legislative bodies, were utterly void as in violation of public policy and good morals; yet it is the undoubted right of all persons whose private interests are affected by legislative acts to present their claims or interests, personally or by counsel, acting openly and professedly on their behalf, to Congress and its committees, and to furnish such facts and arguments as will explain the merits in controversy. When this is done openly and honestly, there is nothing in such a course which is prohibited by public policy or sound morality. In regard to general legislation, the members perform their high trust upon their knowledge of public affairs; but in respect to acts of private legislation, the necessary information can only be derived from individuals. Hence, it is the common practice for the person interested, or his counsel representing him, without concealment to make such representation to the members or committees

of Congress as may be necessary to a full understanding of the facts. We do not understand that any of the decisions condemn this practice, but they all incidentally support it. Judicial language of unusual severity has been justly uttered against secret and sinister efforts to procure public legislation, but not against open and avowed advocacy by an attorney of a bill for the relief of an individual. This point was disposed of on the demurrer, upon the admitted allegations of the bill, that the services rendered consisted in a fair and honorable representation of the claim. Another objection disposed of on the same occasion was, that the contract for a contingent fee was not a transfer, either in law or equity, of the claim or any part of it, so as to render it void by the provisions of the act of Congress of February 26, 1853. We regard an agreement for a contingent fee of the amount which may be allowed as simply a measure of compensation. It has no element of an assignment, and cannot be made one except by overlooking its meaning and purport.

The ground is now taken that equity can exercise no jurisdiction for the reason that complainant has no lien upon the fund. It is admitted that an attorney or counsel in a cause in court has a lien on money collected, and in his hands, for his fees and disbursements, but it is contended that such a lien does not exist for services which are beyond the scope of a lawyer's professional business; that services in presenting a claim to members of a legislative body are non-professional and cannot become the foundation of a lien. In considering this position, we ought to remember that the United States cannot be sued in this class of cases, and the only remedy the defendant had was in the forum of Congress. Had his demand been against a party capable of being sued in a court of equity, his attorney would confessedly have a lien upon the money collected. In either case the services are rendered for precisely the same object; and to distinguish between the services of an attorney, in respect to the means he has used in collecting the demand, where the result is practically of the same benefit to his client, is neither reasonable nor just. When he collects without suit upon a mere demand, he is protected as much as if he had accomplished

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the result by judgment and execution. To collect demands is certainly within the scope of professional business, by whatever means the process is conducted, and whether from States or individuals. The court are therefore of opinion that a lawyer who has successfully prosecuted a claim for relief against the United States, upon an agreement for a contingent fee out of the allowance, has a professional lien upon the fund, which may be enforced in a court of equity.

Another objection to the jurisdiction is, that such a lien can only exist on money collected and in the hands of the attorney, and that it cannot exist on money in the Treasury of the United States. This point has been overruled in the case of *Wylie vs. Coxe*, 15 How., pp. 415, 417, 420, where the complainant, by agreement, was to receive a contingent fee out of the fund awarded and which was in the Treasury. The court held that the contract constituted a lien upon the fund, and that such lien was a sufficient ground for an equity jurisdiction, and the court seem to lay some stress upon the fact that the executrix who claimed the fund resided in Mexico, and that the payment to her would probably place it beyond the reach of the complainant. This observation applies to the case here. The fund is in the Treasury; the defendant resides in Virginia and is insolvent, and the payment of the fund to him would evidently place it beyond the reach of this complainant. The principle which gives a court of equity jurisdiction to establish a lien in such a case is clearly recognized by the Supreme Court, and we think we ought to apply it in this case.

In the next place it is said that the agreement of defendant was with Child the father, and that it terminated with his death. It is shown, however, that the plaintiff was in co-partnership with his father, and jointly interested with him in his business, and that on his death he became his executor, and continued to prosecute the claim with the knowledge and approbation of the defendant, and without any new arrangement, until the act of Congress was passed providing for its payment. From this it is fair to presume that the agreement was in the interest of the firm, and that the services were performed by the complainant after the death of

Child vs. Trist.

his father, with the approval of the defendant, in execution of the contract. In our opinion he is estopped by his own conduct from denying the defendant's interest, after accepting his services rendered by him in good faith, as he evidently understood, under the agreement.

It is clear that it is a just and honest claim, and that the stipulated compensation is fully earned, and we can see no technical barrier to obstruct the plaintiff's remedy in this form.

There must be a decree for complainant.

Mr. Justice WYLIE dissenting.

Stott et al. vs. Rutherford.

STOTT ET AL. vs. RUTHERFORD.

AT LAW.—No. 7122.

A lease of real estate in which the lessors are described as "acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School," parties of the first part, and who executed the lease in their individual names and seals, and which contained reciprocal covenants to be performed by the parties respectively, one of which was to pay rent on the part of the lessee to the lessors, as in their own right, is a nullity. It is a nullity as to the owner, because it is not his contract; and as to the lessors, because they have no estate in the property; and as to the lessee, because it is not binding on the other party. And the rule that a tenant shall not be allowed to dispute his landlord's title has no application to such a case.

The material facts are stated in the opinion of the court.

William A. Meloy for plaintiff.

L. G. Hine for defendant.

Mr. Justice WYLIE delivered the opinion of the court :

This is an action brought by lessors against a lessee, on the covenants of the latter to pay rent, taxes, and to put and keep the premises in a certain condition of repair.

The lease declares as follows: "This indenture made, &c., between P. D. Gurley, Charles Stott, Wm. McLean, Will. L. Waller, Jas. P. Tustin, P. A. Tscheffeley, and John M. McCalla, acting as a church-extension committee, by authority and on behalf of the General Assembly of the Presbyterian Church, Old School, of the first part, and Wm. Rutherford, of the second part, all of the city of Washington, D. C., witnesseth."

The lease was for five years, from the 1st day of February, 1864, at a rent of \$500 a year, payable half yearly to the lessors, their successors or assigns, and contained a covenant

on the part of the lessee to pay the rent, as well as all taxes and assessments, and to put in repair a building on the premises which had been falling into decay; and at the expiration of the term, "to surrender and deliver up the possession of said premises to the said parties of the first part, their successors or assigns."

It contains the stipulations, also, to be observed by the lessee, which are not material in this controversy.

A lease of real estate which sets out on its face that the lessor has no interest of his own in the subject, but that he assumes to act in the matter on behalf of the owner, who is named, but which contains reciprocal covenants to be performed by the parties respectively, one of which is a covenant on the part of the lessee to pay the rent to the lessor, as in his own right, and which is executed by the parties in the usual form, as between individuals contracting in reference to their own property, is a nullity. It is a nullity as to the owner because it is not his contract; it is a nullity as to the lessor because he has no estate in the property; and it is a nullity as to the lessee because it is not binding on the other side. And that was the contract in the present case. The owner, it is true, might maintain his action against the tenant in such a case for use and occupation, but not on this contract. The rule that a tenant shall not be allowed to dispute his landlord's title has no application to such a case. The tenant himself is thus estopped, but others are not. If the lessor himself shows that he had no title, or if the tenant be evicted by a paramount title, or if the lessor's estate have come to an end before the expiration of the term, the rule does not apply. To say that the tenant is estopped from setting up a defense which is valid on the very face of his lease, would be estoppel reversed.

In *Frontin vs. Small*, Ld. Raym. R., 1418, the lease was made by an agent in his own name, but the rent was to be paid to the owner. The rent being in arrear, the agent sued the tenant on his covenant to pay; and defendant demurred to the declaration for the reason that it appeared on the face of the contract that the agent was not the owner of the property, and therefore the lease was void. For the plaintiffs it was argued that the lease being under seal the tenant was

estopped to deny its validity. But the court held that the lease was void on its face because it showed that the lessor had no interest in the land, and could not be upheld even by the covenant that the rent was to be paid to the owner. (See Selw. N. P., 539, 540.) And in 2 Kent's Com., it is laid down that an "attorney who executes a power, as by giving a deed, must do it in the name of his principal, for if he executes it in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of his principal," citing many authorities.

It may seem inequitable that a tenant who has entered into and enjoyed the use of property under a lease like the one now in question should not be obliged to comply with his covenants. This argument was urged by plaintiff's counsel in the case of *Frontin vs. Small*. But the court held "that it appearing on the declaration that the lease was void because it was not made in the name of James Frontin, whose house it appeared to be, and that the plaintiff only made it as his attorney, there could be no estoppel; and then the covenant to pay the rent was void, and the plaintiff could not maintain the action."

In *Croade vs. Ingraham*, 13 Pickering, 35, Shaw, C. J., said: "Nor does the doctrine of estoppel, or the maxim of *nil habuit in tenementis*, apply. Here it appears on the face of the instrument itself, that the plaintiff intended to transfer to Jabel Ingraham, by the instrument called a lease, all the right which she had to have dower assigned to her; and it is a general rule governing the doctrine of estoppel, that where the truth appears on the face of the instrument itself, upon which the estoppel is alleged to arise, no estoppel is wrought as to the fact thus appearing."

In the present case the record shows that the plaintiffs were not even vested with the legal estate in the property which they undertook to demise. They were simply agents, "acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School." The contract, on its face, shows that they were a committee only, acting on behalf of a principal, whose name

is set out, and to whom the property belonged. It is said, however, that the Presbyterian Church, although a body constituted of many members residing in all parts of the country, is not a corporate body, and, in matters of this character, is obliged to employ the agency of committees. That may be true; and, if so, the church, *eo nomine*, could not maintain any action in court. But the title to this property must have been vested, at the time this contract was entered into, in some one or more persons in trust for the church; otherwise the instrument in question would be doubly void, showing that the plaintiffs had no title themselves, and were representing a body of men who could have none.

But, in fact, it was shown, at the trial in the circuit court, as well as on the argument in this, that a corporation exists under an act of the legislature of Pennsylvania, consisting of trustees empowered to hold the title and manage the temporalities of the whole church, wherever the property may be situated. This corporation is styled "The Trustees of the General Assembly of the Presbyterian Church in the United States of America." The act incorporating this body, to be sure, contains a limitation as to the amount of property which these "trustees" are authorized to hold in trust for the church; and if that limitation had been already reached, it may have become necessary that private trustees should be appointed by the church to receive the conveyance of other property for its use. How the fact was in this respect, as to the present case, does not appear. But in either of these aspects, the action should have been brought by some other party than these plaintiffs.

Had the instrument of demise in question been silent as to the agency of the lessors, the defendant might have been estopped to deny their title, on his own liability to them under the contract. As it is, the doctrine of estoppel operates against them, and not against the defendant.

These considerations dispose of the present action under well-settled principles of special pleading, which we are not at liberty to disregard without disturbing the whole order and consistency of that branch of the law, and unsettling principles which are necessary for the protection of rights themselves.

The other matters of defense of a less technical character, including the payment of \$500 to one of these plaintiffs for compromise of this claim, it is unnecessary to pass upon.

The judgment should be reversed and judgment entered for the defendant, *non obstante veredicto*.

Mr. Justice MACARTHUR, with whom Mr. Justice HUMPHREYS concurred, dissenting :

While I agree that the authorities referred to in the learned opinion just read sustain the position that a deed executed by an agent or attorney in his own name is inoperative as to the principal, whether the name of the latter appears upon the face of the instrument or not ; yet I am very clear that this rule can have no application to the case at bar. The lease under consideration is executed by the lessors in their own names and with their own seals. The name of no principal is added. The operative words of letting in such a deed import an estate in the parties demising, and the lessees cannot impeach it for any reason not appearing upon its face. The form of executing it is the one usually adopted by persons in contracts respecting their own interests, and there can be no pretense in the concluding part of it that it purports to be their act as agents. In the first clause, the parties of the first part describe themselves as "acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School," and it is argued that these words disclose the name of their principal and render the deed a nullity. It seems to me that this addition to the names of the plaintiffs, as was said in *Toft vs. Brewster*, 9 John., 334, is a mere *descriptio personarum*. So far from showing a principal, it has been decided in the highest court of Pennsylvania that the General Assembly had no recognized legal status. It is a mere voluntary association, utterly incapable of holding an estate in land, or of being a principal in any transaction, or delegating a legal power to be executed by others. In order to render this lease void under the authorities cited for that purpose, it must appear upon its face that the plaintiffs acted solely as agents ; that the name of the principal for whom they acted was mentioned

in the body of the instrument, and was possessed of the title affected, and that such principal was either a natural person or a corporation, having legal capacity to hold interests in real estate, and to grant authority to others to execute sealed instruments in their own name; for unless all this appears on the face of the lease, it does not fall within the principle of these citations. In my opinion it is not desirable that this technical and rigid rule of the common law should be extended to cases not clearly within the adjudications. To allow a lessee who has accepted the lease and enjoyed possession of the premises for a considerable portion of the term to escape from paying the stipulated rent, violates every principle of justice and equity. I do not believe such to be the law.

As, therefore, there is nothing on the face of the deed to affect its validity, there is no rule better settled than that the lessee is estopped from impeaching it.

But even if the plaintiffs had mentioned a competent person or corporation in the body of the instrument as their principal, it would not follow as a necessary consequence that its covenants would be void as against themselves. The covenants contain words sufficiently expressive of their intention to be bound in their personal capacity. "If one covenants in his own name, though it be expressly *in autre droit*, and in a representative capacity, as executor, guardian, trustee, committee, agent, or otherwise, he is himself personally bound." (1 Am. Lead. Cases, 434, 436, and cases cited in note.) *Duval vs. Craig*, 2 Wheat., 45, was where a conveyance of real estate contained covenants against incumbrances and the covenantors added after their names, "as trustees," &c. Mr. Justice Story remarks, in delivering the opinion, "A trustee, merely as such, is only suable in equity; but if he chooses to bind himself by a personal covenant he is liable at law for a breach thereof, in the same manner as any other person, although he describe himself as covenanting as trustee; for in such a case the covenant binds him personally, and the addition of the words 'as trustee' is but matter of description to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate

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on this subject. An agent or executor who covenants in his own name and yet describes himself as agent or executor is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal."

The case of *Lutz vs. Linthicum*, 8 Pet., 165, is to the same effect. So here it may be emphatically said that these plaintiffs "had no principal to bind." The authorities are numerous on this point, and seem to be clear that the agent may bind himself if his covenants are personal to himself, even though his representative capacity appears on the instrument. As the covenants are of that character here, it is apparent they must be equally binding upon the defendant.

My conclusion is that the lease is the deed of the plaintiffs, and they should be permitted to retain the judgment. I am opposed to a reversal.

FOWLER vs. GREAT FALLS ICE COMPANY.**AT LAW.—No. 8069.**

- I. F. entered into a written agreement, together with others, who were part owners with him, for the sale of their joint property to C.; and it was one of the conditions of the transfer that F. should be employed by C. for one year, at a salary of \$2,500 per annum, payable monthly. Held that F. could maintain an action against C. for a month's wages, as they fell due, if C. refused to pay the same. Held, also, that it was an independent covenant with F., and that he could sue for such wages in his own right, without making the other part-owners of the property conveyed, parties to the suit.
- II. Where, however, the undisputed facts show that F. absented himself from the duties of such employment for a period of twelve days, on account of the sickness of a child, but without giving notice or obtaining leave from C., there is a breach of contract on his part, and if C. refuses to receive him back again into service he cannot maintain an action for salary after such breach.
- III. HELD, also, that it is error, where the fact of absence is undisputed or admitted, to submit the question to the jury whether such facts were or were not a breach of the contract.

STATEMENT OF THE CASE.

The plaintiff brings this action upon an agreement which he executed with several other parties, who are therein styled parties of the second part. They had been doing business under the name of the Washington and Georgetown Ice Company, and by this agreement they sold and transferred all the personal property used in their said business to the defendants, who were the parties of the first part. It also contained covenants for the sale of property belonging to some of the other parties, but in which the plaintiff was not interested. The eighth clause of the agreement is in the following words:

“Said party of the first part agrees to employ T. T. Fowler as superintendent of the Great Falls Ice Company, for one year from the date of transfer, and for as much longer time as is mutually agreeable, at a salary of (\$2,500) twenty-five hundred dollars per annum, payable monthly.”

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The declaration avers, for breach, that the defendant failed to pay the installments of salary for the months of November and December, 1870.

The pleas traverse the alleged breach, and aver that during said months plaintiff did not discharge the duties, the performance of which was a condition precedent to the payment of such salary. On the trial it appeared that plaintiff entered upon such service on the 1st of April, A. D. 1870, and continued therein as defendant's superintendent until the first day of November following, when he absented himself for a period of twelve days on account of the mortal illness of his child, and without giving notice to or obtaining defendant's leave; that after such period of absence he returned and offered to resume the duties of his said employment, and was not permitted to do so by the defendants.

The defendant asked the court for two instructions to the jury, which were refused, one of which is as follows, and the other is fully stated in the opinion of this court:

1. That if they found from the evidence that the plaintiff entered the defendant's service under a contract for one entire year, and that the defendant, in consideration of the performance of his duties in said service, promised to pay the plaintiff the annual salary of twenty-five hundred dollars, by monthly installments, the provision for such monthly payments did not affect the entirety of the said contracts, nor render the same apportionable, and that the plaintiff having brought his action on the contract before the expiration of his agreed term of service, has done so prematurely, and cannot recover. Wherefore they should find for the defendant.

L. G. Hine for plaintiff.

T. A. Lambert, for defendant, made the following points:

1. The plaintiff possessed no right *on the contract* until the year of his agreed service had expired. The present suit is therefore not maintainable, because premature, and the first of the defendant's prayers should have been allowed.

2. A servant who absents himself without leave from the

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service of his employer thereby violates his implied promise to serve the latter faithfully, and justifies the employer in refusing to retake him into his service; but the plaintiff absented himself without leave from the service of his employer (the defendant) for a period of twelve days, to wit, from the 1st until the 12th days of November, 1870; therefore the plaintiff thereby violated his implied promise to serve the defendant faithfully, and justified the latter in refusing to retake him into their said service.

Mr. Justice OLIN delivered the opinion of the court :

This action under the common-law rules of pleading would have been either an action *of debt or covenant*, the contract executed by the parties being under seal.

- The defendant is alleged to be a corporation formed under the laws of Maryland, and doing business in this District. Several parties designated as parties of the first part enter into an agreement with the defendant, by which certain personal property was sold and delivered to the defendant, in respect to some of which the plaintiff, Fowler, had no interest at all, and as to some other property agreed to be sold, Fowler, the plaintiff, had an interest as part owner. It was one of the conditions of the transfer of this property that the plaintiff, Fowler, should be employed as superintendent of the defendant's company for one year, at a salary of \$2,500 per year, payable monthly.

- Several exceptions were taken to the rulings or decisions of the justice presiding at the circuit court, which it is unnecessary to discuss at length.

First. That the contract was an entirety, and could not be sued on until the expiration of one year from its inception. The contract was undoubtedly entire for one year's service at \$2,500 for the year, but it was agreed that the salary should be paid in monthly installments; that is, at the end of each month's service as superintendent, he should be paid one-twelfth of \$2,500, and we have no doubt whatever that, at the end of a month's service as superintendent of the defendant's company, he might maintain an action against the

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company for his month's wages, on neglect or refusal of the company to pay the same.

Second. It is objected that the suit cannot be maintained, for the reason that all the parties named in the agreement under seal in the case were not made parties plaintiffs or defendants.

The only controversy being in respect to Fowler's wages as superintendent, it is difficult to perceive how any of the parties to this agreement had any interest in the question litigated except Fowler and the defendant. The covenant with him on the part of the company was to pay him a salary as superintendent. Whether that salary was paid or not was a question that affected Fowler alone; in other words, this covenant with Fowler was wholly independent of the covenants and agreements with the other parties named in the said sealed instrument. The only question, however, arising in the case which we deem it important to consider, grows out of the following exception, namely, "that if the jury believe from the evidence that the plaintiff on the first day of April, 1870, entered the service of defendant as superintendent for the period of one year for a salary of \$2,500 per annum, under and by virtue of a contract in writing and under seal, and that on the first day of November, 1870, he absented himself from said service without the leave of the defendant, notwithstanding his subsequent return on the twelfth day of November, 1870, and alleged offer of service, they will find for the defendant, which opinion and direction the court refused to give to the jury, but was of opinion, and so directed the jury, that they were to determine from all the circumstances of the case whether the plaintiff by reason of his having so aforesaid absented himself without leave from the defendant for the period of twelve days, to wit, from the first day of November, 1870, had been guilty of a breach of his said contract with the defendant, and justified their refusal to retain him longer in their service."

To this ruling and decision of the judge an exception was taken. This exception presents the question whether, if the facts mentioned in it be found by the jury to be proven, there was a breach of the contract on the part of Fowler, the plaintiff. Of this we think there can be no doubt. The justice

refused to charge as requested, but directed the jury that they were to *determine from all the circumstances of the case* whether the plaintiff, by reason of his having absented himself without leave from the defendant's service for the period of twelve days, had been guilty of a breach of his contract. We have carefully looked over the record in the case, to discover what were the other circumstances which would modify the rule of law asked to be applied to the facts stated in this exception. We think the learned justice had in his mind two facts which the evidence tended to prove; first, that the plaintiff left the defendant's employment by reason of the mortal sickness of his child; second, that, before leaving, he went to the office of the company, but found no one there to whom to make known his wish or purpose to leave. These two latter facts seem to have been undisputed on the trial, as I believe were also the material facts which are quoted in the exception. Now, if the justice who presided at the trial believed, as he seems to have done, that to leave the company's employment on account of the sickness of his child, was no breach of his contract for service, especially if he went to the defendant's office for the purpose of asking leave of absence, but found no one there with whom to communicate, he ought to have so instructed the jury. Instead of this, while all the facts are undisputed, the whole question is referred to the jury to say whether there was or was not a breach of contract on the part of the plaintiff. The office of the jury is to find the facts, and it is the duty of the court to apply the rule of law applicable to facts so found, and where the material facts of a case are undisputed or agreed upon, it is precisely the same as a special verdict in which the jury find the facts of a case and ask the court to apply the rules of law applicable to such facts.

It seems to me that, upon the undisputed facts of this case, there was a clear violation of the contract on the part of the plaintiff, on the 1st of November, 1870, and that consequently he could not receive compensation for the months of November and December.

A new trial must be granted.

**WEYMOUTH vs. THE WASHINGTON, GEORGETOWN
AND ALEXANDRIA RAILROAD COMPANY.**

AT LAW.—No. 8230.

A railroad corporation, created by the legislature of Virginia, and also allowed to run its road, by act of Congress, into the District of Columbia, borrowed a sum of money in the city of New York, through the agency of its treasurer, and no part of it having been repaid, suit was commenced in the supreme court of the State of New York, by service of process upon its secretary, who was found there, and judgment rendered for the full amount. Action is brought in this court upon a transcript of the judgment. Held, that the corporation, having contracted the debt in the State of New York, the court there obtained complete jurisdiction by such service, and that such judgment is entitled to the same conclusiveness here as in the State where it was rendered. Held, also, that it is competent for a State legislature to authorize the commencement of suits by the service of process upon the president, secretary, or treasurer of a foreign corporation having a place of business, or making contracts within that State.

Cook & Burgess for plaintiff.

T. T. Crittenden for defendant.

Mr. Justice OLIN stated the case and delivered the opinion of the court:

This case was certified to the court in general term for its opinion by the Chief-Justice, which certificate is as follows:

This case came on for hearing this day, and the plaintiff, to sustain his side of the case, offered in evidence a transcript of a judgment obtained in New York, which is on file among the papers, to which the defendant, by his counsel, objected, on the ground that the service as set forth in said record was insufficient, whereupon it was agreed that a judgment be entered for the plaintiff, which was accordingly done, and the question arising on the record and the objection of the defend-

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ant reserved, and is certified to the court in general term for its opinion.

It will be seen by the certificate that the only objection made to the validity of the judgment arises from the alleged insufficiency of the service of process upon the defendant. The proof of that service, as appears from the judgment-record, is as follows :

“ CITY AND COUNTY OF NEW YORK, ss :

“ Edward H. Hunt, of said city, being duly sworn, saith that on the 4th day of March, 1870, at the hotel in the city of New York known as and commonly called the Astor House, he served on the above-named defendant the summons in this action, together with a copy of the complaint; and that such service was made by delivering to and leaving with Joseph B. Stewart, the secretary of the defendant, a copy of such summons, and a copy of said complaint annexed thereto; that deponent knew the person so served to be the secretary of the defendant; and further saith not.

“ EDWARD H. HUNT.

“ Sworn to and subscribed before me this 20th day of April, 1870.

“ B. ROELKER,

“Notary Public, N. Y. City and Co.”

The complaint alleges that the plaintiff, at the special instance and request of Charles H. Stewart, who was then treasurer of said defendant, and had power and authority to borrow money for and on behalf of the defendant, loaned of plaintiff, for and on behalf of defendant, the sum of \$5,000, no part of which sum had been paid.

The complaint was verified in the usual manner required by the laws of New York. The service of process in the case shown to be on the secretary of the company, the question arising is whether it is competent for the legislature of the State of New York to authorize the commencement of a suit by the service of process upon the president, secretary, or treasurer of a foreign corporation, having a place of business or making contracts within that State. Upon this ques-

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tion I have no doubt. The only possible service of process that can be made upon a corporation is upon some member of it. Usually the law has provided that service of process upon such corporation may be made upon its president, secretary, or treasurer; and such service was made in this case, namely, upon the secretary.

It is suggested that a corporation has no existence beyond the jurisdiction of the district or State creating it. This is true in some sense, and in other respects a gross fallacy. Foreign corporations, not only those created by the several States of the Union, but corporations created by foreign governments, are allowed by the comity of States to come into this District, open an office for the transaction of business, make contracts for large amounts of money, upon which contracts they may sue for their violation in the courts of this District; and yet is it to be held that, for a violation of the contract on the part of the company, no suit can be brought here against such company, but that the local jurisdiction creating such company must be sought, in order to enforce any right that a party supposes he has against such company? For illustration, let me instance that nearly one-third of the insurable property of this District, including houses, household furniture, and other personal property, is insured by certain incorporated companies created by the laws of the State of Connecticut. These corporations have offices and agents here who make their contracts of insurance, and for a violation of them on the part of the insured they may maintain an action; but for a violation of that contract on the part of these companies, shall it be held that the insured must resort to the courts of Connecticut to enforce the provisions of such contract? Still worse, probably a larger amount of property in houses and other personal chattels is insured by the London and Liverpool insurance companies than is insured by any half-dozen corporations created by the several States of the Union. These British corporations may come into any court of the United States to enforce by suits at law the provisions of such contracts; they have offices and agents here who make these contracts; the property insured is within the United States; the contract is made here and all the circumstances attending its alleged violation occur here.

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Shall it be said that for a violation of such a contract on the part of the company the insured must resort to a British court for redress? If that be so, it would be well for every local jurisdiction to declare by statute every contract made by corporations outside of such District or State absolutely null and void. (See *Railroad Company vs. Harris*, 12 Wall., 65.)

We think that the judgment entered by the circuit court against the defendant should be affirmed with costs.

WYLIE and HUMPHREYS, JJ., dissenting.

LANGDON vs. PURDY.**AT LAW.—No. 9041.**

I. L. made an agreement with P., by which the former was to take charge as foreman of glass-works belonging to P., and the latter was to pay him fifteen dollars per week, and at the end of eight months to transfer to L. an interest of \$600 in the works, or, if he should prefer, in money. After L. commenced work the factory was burned, and he took charge of rebuilding it, and continued for nearly a year to manufacture glass after the factory was rebuilt. The written contract was made after such rebuilding, and when the eight months expired L. elected to take the money.

II. HELD, that there was a substantial performance of the contract, and that L. was entitled to recover the \$600 in money.

STATEMENT OF THE CASE.

This action is brought upon an agreement, by the terms of which Langdon was to take charge of and conduct, as foreman, the glass-works belonging to the defendant in the city of Washington, and he agreed to pay him fifteen dollars per week, and at the expiration of eight months from the 14th day of February, 1870, the defendant further agreed to assign to the plaintiff an interest in said property equal in amount to \$600; or, if plaintiff should prefer, he would pay him the said sum in money.

The agreement was dated June 13, 1870, and the plaintiff had commenced working for the defendant in the early part of the preceding February. It was also shown upon the trial that about the middle of April, 1870, the glass-works were destroyed by fire, and that plaintiff, at the request of defendant, superintended the rebuilding of the same for nearly two months, when he again commenced the manufacture of glass, and continued so to do until February 11, 1871. It was while plaintiff was superintending the rebuilding of the works that the original agreement was reduced to writing, and at the expiration of the eight months therein mentioned, he elected to have the sum of \$600 in money instead of an interest to that amount in the glass-works, which the defendant

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refused to pay. Upon this state of the proof the defendant's counsel prayed the court to instruct the jury as follows :

"If the jury find from the evidence that, during several months of the period referred to in this special agreement offered in evidence, the glass-factory of the defendant was not in operation, having been destroyed by fire, then the plaintiff is not entitled to recover the \$600 provided for in said special agreement, but only so much as the services actually rendered by the plaintiff were reasonably worth, over and above what has been paid to him."

Which said instructions the court refused, and the case is here upon exceptions to this ruling.

Brown & Hawes for plaintiff.

Cox & Webb for defendant.

By the COURT :

We think the proof shows a substantial compliance on the part of the plaintiff with the agreement. It is contended that he could not perform his duties as foreman of the glass-works, from the time they were destroyed by fire until they were rebuilt ; but we think that this proposition is not applicable to the facts of the case. The contract was made and executed about two months after the fire, and the defendant having signed it with knowledge of that fact, he is now estopped from denying that the plaintiff is entitled to the full benefit of its provisions. It is clear to us that, by executing the agreement at that time, the defendant recognized the services rendered by the plaintiff as having been rendered in performance of its conditions. It was reduced to writing after the destruction of the works, and while the plaintiff was superintending their reconstruction. By the terms of the contract, plaintiff is to take charge of the works, and by the proof he was then engaged, with the knowledge and approbation of the defendant, in the work of superintending them. We think there is no substantial variance between the proof and the allegation. The instruction asked for was properly refused, and the judgment must be affirmed.

Henderson et al. vs. Reilly et al.

HENDERSON ET AL. vs. REILLY ET AL.**AT LAW.—No. 8824.**

- I. A letter of credit, drawn in favor of M., was addressed to a mercantile firm in Baltimore, stating that the parties who had signed it were willing to become sureties for M. in the sum of \$1,200 for the faithful performance of his duties as their agent.
- II. HELD, that such letter was an offer for a future credit or act, and that notice was necessary to be given to the guarantors by the person giving the credit, within a reasonable time, that he had accepted the offer, and intended to act upon the faith of it.
- III. HELD, also, that if such person sold goods, or gave credit to M. on the faith of such guarantee, without giving notice, the guarantors were not liable.

STATEMENT OF THE CASE.

The plaintiffs brought suit against the defendants upon the following instrument, claiming it to be a guarantee :

GEORGETOWN, D. C., *January 14, 1871.*

GENTS: We, the undersigned, citizens of this town, being well acquainted with L. A. Mahoney, of this town, recommend him to your confidence and trust, and are willing to become bound as sureties for his faithful performance of his trust and duties as your agent, and, also, that he will make due returns to you monthly, and every month, of all moneys belonging to you which may come into his hands, to the amount of twelve hundred dollars, or four hundred dollars each.

**JAS. A. REILLY.
JOHN J. COOK.
F. W. JONES.**

To Messrs. R. MASON & SONS, *Baltimore.*"

The declaration also contained a count for goods sold and delivered.

The defendants pleaded the general issue.

This letter was addressed to the plaintiffs, who are merchants doing business in the city of Baltimore. The said L.

A. Mahoney, mentioned in the letter, resides in the city of Georgetown, in this District, where he carries on business, and the defendants are also residents of the same place. The plaintiffs proved on the trial that there was due them a balance of \$605.72 for goods they had furnished Mahoney on the faith of said letter, and that they had no acquaintance with Mahoney, and would not have furnished him the goods without said letter or offer to guarantee, and that Mahoney was insolvent.

There was a count for goods sold and delivered, which may be considered as out of the case, for the reason that plaintiffs do not insist upon it.

The court instructed the jury that, to entitle the plaintiffs to recover on said letter of guarantee, they must prove that notice had been given in a reasonable time after said letter of guarantee had been accepted by them, to the defendants, that the same had been accepted, and that there being no evidence showing, or tending to show, any notice by plaintiffs to the defendants of their acceptance of said offer to guarantee, and of their intention to act upon it, the jury must find for the defendants. The case comes up upon exceptions to these instructions.

W. D. Cassin and J. J. Johnson for defendants.

Notice of acceptance of a guarantee not necessary to render the defendants liable, but that they became absolutely bound the moment the goods were delivered in compliance with the guarantee. *Smith & Crittenden vs. Dann*, 6 Hill, 543; *Whitney & Schuyler vs. Groot*, 24 Wend., 81; *Charles Bent et al. vs. Rolun Hartshorn*, 1 Met., 24; *Union Bank vs. Cortes' Executors*, 3 Com., 204.

Hugh Caperton for defendants.

A guarantee cannot be enforced without notice of the intention to rely upon it. *Clark vs. Russell*, 7 Cranch, 69; *Douglas vs. Reynolds*, 7 Peters, 117.

A mere overture or offer to guarantee is not binding unless accepted. Chitty on Contracts, 437, note 2, (1;) *Menard vs.*

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Scudder, 7 La. Ann., 385; *Beekman vs. Hale*, 17 Johns. R., 134; *Emmerson vs. Graff*, 29 Pa. State R., 358; *Caton vs. Shaw*, 2 Harr. & Gill, 13; *Stafford vs. Lowe*, 16 Johns. R., 67; *Lowry vs. Adams*, 22 Vermont, 160.

The COURT, in substance, held :

That the authorities on brief of appellees sustain most fully the charge of the court to the jury in this case. When a guarantee is prospective, and looks only to future transactions, in order to invest it with the obligation of a contract, the party to whom it is addressed must give notice of his intention to act upon it. The guarantor has a right to know whether it is accepted, in order that he may make such arrangements as will secure himself for his responsibility.

Although insolvency may sometimes relieve a party from giving notice, this is not such a case; for notice here is essential to the completion of the contract.

It follows from these views that the judgment must be affirmed.

KIRK vs. PARKHILL.

AT LAW.—No. 9099.

- I. Where a defendant in ejectment sets up an outstanding mortgage belonging to a stranger to the record, in which he does not claim to be interested, it must be a present and subsisting mortgage; otherwise it will be presumed to have become extinguished.
- II. Where a mortgage was executed and recorded more than forty years before the commencement of an action of ejectment, it is presumed to be satisfied, and the court can so rule without the aid of a jury.

STATEMENT OF THE CASE.

This was an action of ejectment by the plaintiff to recover from the defendant a certain lot of land in the city of Washington. The bill of exceptions shows that on the trial the plaintiff gave in evidence the recorded allotment of square 536 in said city by the United States commissioners to Daniel Carroll, dated November 5, 1796, and which allotment embraced the premises described in plaintiff's declaration. The plaintiff also gave in evidence several deeds by which he deduced a continuous chain of title from said Carroll to himself.

The defendant, for the purpose of showing title out of the plaintiff, offered in evidence a mortgage upon said premises, executed by said Carroll and wife, to the president and directors of the Bank of Washington, dated October 21, 1821, and properly recorded; and thereupon defendant's counsel prayed the court to instruct the jury that the said mortgage was an outstanding title which barred the plaintiff's right to recover; which instruction the court refused to give, but instructed the jury to find for the plaintiff, to which refusal and instruction the defendant, by his counsel, excepted. The question now before the general term is, whether this exception is well taken.

Kirk vs. Parkhill.

M. Thompson, for plaintiff, made the following points, and cited the following authorities :

Carroll, by the mortgage-deed, conveyed the legal title to the president and directors of the Bank of Washington, where it has ever since remained. Williams on Real Property, 354; Taylor's Landlord and Tenant, sec. 703; Douglass, 21; *Jamieson vs. Bruce*, 6 G. and J., 74; *Brown vs. Cram*, 1 N. H., 172; *Heighway vs. Pendleton*, 15 Ohio, 735; *McElery vs. Smith*, 2 H. J., 72; *Evans vs. Merriken*, 8 G. and J., 39.

Carroll, not having the legal title, could not create a trust. 2 Washburne on Real Property, 195, sec. 11; *Crop vs. Norton*, 2 Atk., 76; *Downe vs. Thompson*, 9 Ad. and E., 1030.

The plaintiff cannot recover without strict proof of legal title. 1 Saunders, 454.

R. Ross Perry for defendant, among others, relied upon the following points and authorities :

A mortgage is presumed to be satisfied after the lapse of twenty years, unless there has been some action under it or recognition of it within that period. 2 Greenleaf on Evidence, p. 469, § 528. *Hughes vs. Edcards*, 9 Wheaton, 497; *Pratt vs. Vattier*, 9 Peters, 415; *Boyd vs. Hance & Harris*, 2 Md. Chanc'y Dec., 210; *Jackson vs. Meyers*, 3 Johnson, 541; *Waterman vs. Haskins*, 7 Johnson, 283.

A satisfied mortgage cannot be set up against the plaintiff, in ejectment, as a bar to recovery. *Peltz vs. Clarke*, 5 Peters, 481; *Greenleaf's Lessee vs. Birth*, 6 Peters, 302; *McKnight vs. Taylor*, 1 Howard, 168, also 193; *Morgan's Lessee vs. Davis*, 2 Harris & McHenry, 9.

The COURT held :

That where a defendant in ejectment sets up an outstanding title in a stranger, in which he claims no interest, it must at least be a present subsisting title; otherwise it will be presumed to have become extinguished. The deed of mortgage in this instance was recorded more than forty years before the commencement of the action, and no steps had been taken

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under it, and there have been repeated conveyances of the premises down to the time the plaintiff acquired his title to the same. It is a settled rule of law that a mortgage, after the lapse of twenty years, without explanatory circumstances, will be presumed to have been satisfied; and the court will apply this rule without the aid of a jury. It is not necessary in such a case to show a formal release, for the presumption is that the mortgage is no longer a subsisting lien, and cannot therefore be used in ejectment for the purpose of destroying the plaintiff's right of action.

Judgment below is affirmed.

RHAWN vs. GRANT.

AT LAW.—No. 7927.

A note made in the State of Pennsylvania is not invalidated by the laws of that State, though more than the legal rate of interest is contracted for. The excess over such legal rate is recoverable by the debtor; and, therefore, a note given in this District, in part payment of the principal of such a note, is to be governed by the usury laws of that State, and as such principal is a valid indebtedness in Pennsylvania, the renewal note given for its consideration is equally binding here.

STATEMENT OF THE CASE.

This suit is brought on the following promissory note:

\$2,000.]

WASHINGTON, D. C., *April 1, 1870.*

Twelve months after date I promise to pay, to the order of W. H. Rhawn, two thousand dollars, at the banking-house of Jay Cooke & Co., value received, with interest.

A. GRANT.

The defendant interposed the plea of usury, on which the plaintiff joined issue.

The note in suit was given in part settlement of another note, dated Philadelphia, March 25, 1868, made by a firm of which the defendant, Grant, was the senior member, to the National Bank of Exchange, of Philadelphia, for \$7,000, payable to the bank on demand. The defendant gave evidence which he claimed proved that on the 31st day of March he gave a check to the bank for \$1,000, and that the same was paid as interest on said last-mentioned note, which made it usurious; and he contended that, as the note in suit was given in part payment thereof, it was affected with the same illegality, and void.

By the law of this District at that time, the legal rate of interest was six per cent., and all contracts for a greater rate were declared to be utterly void, while by the laws of Pennsylvania the contract is not affected; but the penalty where more than legal interest is contracted for, is that the debtor

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shall not be required to pay the excess over such rate; and if he has voluntarily paid it, he can recover it back in an action to be commenced within six months after the time of such payment.

The defendant asked the court to instruct the jury that if they should find that there was paid to said bank the sum of \$1,000 on account of interest on said note of \$7,000, and that said \$7,000 was the consideration of the note in suit, that said \$2,000 note was governed by the law of the District of Columbia, and void for usury; which the court refused, and held that the statute of Pennsylvania upon the subject of interest was the law of the contract; and the defendant excepted, which exception the court allowed.

Nathaniel Wilson for plaintiff:

I. The bill of exceptions does not disclose any usurious contract or transaction.

II. If there was any usury, it consisted in the payment of \$1,000 as interest at the time the note for \$7,000 was given. That payment was made in Pennsylvania. By the laws of Pennsylvania it did not, if made, invalidate or taint the note. The notes given in this District had no relation whatever to this \$1,000 of alleged interest. They were for the payment of the principal of a note which was perfectly good by the laws of the place where it was made.

III. All the interest alleged to be usurious having been paid, the new notes being only for a part of the principal, were perfectly valid. (2 Parsons on Notes and Bills, p. 420.)

Riddle & Miller for defendant:

It can make no difference where the indebtedness arises, when it comes to be *paid* the contract of payment must be governed by the laws of the place where it was made.

In actions for the penalty incurred by the maker of a usurious contract, it has always been held that the offense was committed and the penalty incurred when and where the usurious payment was made. (See *Pearson vs. McGowan*, 3 B. and C., 700; same case, 5 Dowl. and R., 616; 2 Parsons on Contracts, 400-1.)

By the COURT :

We are unanimously of opinion that the ruling of the judge who tried the case must prevail. The note in suit is not invalid on its face by the laws against usury in force in this District at the time it was given ; and the only ground upon which it is sought to affect it with the quality of an illegal contract is, that it was given in part payment of the note made in Philadelphia. But if there was usury in that note according to the laws of Pennsylvania, it was not for that reason invalidated. The excess over the legal rate only was forfeited, and the contract for the payment of the principal and lawful interest was perfectly valid. The note here was given for a part of that principal, and was therefore received in consideration of another contract that was perfectly good at the place where it was entered into. There is no pretense that there was any shift or device, or even intention, to evade our statute. As we can see no error in the judgment below, it must be affirmed.

3 D C

JACKSON vs. JACKSON.

EQUITY.—No. 2915.

- I. Where real estate has been purchased by the joint earnings of husband and wife, and the title taken in the name of the wife alone, an equity by way of trust may be deduced for the benefit of the husband.
- II. In a petition for divorce by the wife in which no alimony is asked, and a cross-bill by the husband charging adultery upon the wife, and that the property was acquired since the marriage by their joint earnings, the divorce was granted upon her petition. Still it was held that under the 9th section of the statute regulating divorces, the court has power to set off to the wife such part of the property as may be reasonable, in view of the resources and circumstances of the husband.

STATEMENT OF THE CASE.

The petition in this case is for a divorce on the ground that the defendant is an habitual drunkard, and is guilty of cruelty toward plaintiff, but no alimony was asked. The defendant answered and filed a cross-bill, charging the plaintiff with having committed adultery on several occasions, and also alleging that plaintiff holds in her own name certain real estate in this city, a description of which and of the improvements thereon is set forth in the cross-bill. The defendant in his cross-bill also sets up that the said property was acquired since the marriage with his money and earnings. He asks for a divorce, and that plaintiff may be decreed to convey said property to him.

In her answer to the cross-bill the plaintiff denies all the charges of adultery, and alleges that she bought the property and built the houses thereon with her own money, derived in part from her father, and in part from the rents of the property and her earnings, and denies that defendant contributed anything toward the same.

Both parties took testimony, which showed that the plaintiff had some money at the time of the marriage, and that she was engaged in washing and ironing. She also rented a house and kept boarders. That the defendant worked as a laborer when the first and second houses were building, earning about \$30 a month, and was employed in the Patent-Office at \$60

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a month for about the period of six years, and while the third house was building; that he was in the habit of giving a portion of his earnings every month to the plaintiff, and that three houses in all were built on the premises in question by the money and earnings of both, and that the same were paid for in small installments extending through several years.

On the hearing the court below decreed a divorce on the petition of the plaintiff, and dismissed so much of the cross-bill as charged the plaintiff with adultery and asked for a divorce on that ground. The court also found that the real estate was paid for with money belonging in part to plaintiff, and by moneys earned by their joint industry and labor, and decreed that the title acquired by the plaintiff was held in trust for their joint benefit, and ordered a partition and conveyance of the west forty feet, or about one-half, of the property to the defendant.

From so much of this decree as directs a conveyance of a part of the property to the defendant, the plaintiff appeals.

A. G. Riddle and *L. G. Hine*, for plaintiff, in their printed brief, made the following points:

I. The statute authorizes a court, when it decrees a divorce, to allow the wife alimony out of the husband's property, or order a return of her ante-nuptial property. But a court has no power, under any circumstances, to decree her property, whenever or however acquired, to the husband. Sec. 9, act of 1860, 12 Stat., 59.

II. The property described in the cross-bill is the property of the wife, acquired and accumulated by her as hers, and so treated and regarded by both herself and husband. The title was taken by her in her own name for herself, and with his consent, and is hers and not his.

F. Miller and *W. A. Meloy* for defendant.

CARTTER, C. J., delivered the opinion of the court:

The property in controversy belongs apparently to the separate estate of the wife, but there can be no doubt upon the

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testimony that the united earnings and industries of husband and wife contributed to its purchase and improvement, and an equity by way of trust may therefore be deduced for the benefit of the defendant. But it is argued that though this may be so, yet no division of the property can be made, as no alimony is asked in the original bill. The 9th section of the statute regulating divorces in this District is as follows:

“In all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower, and to award to the wife such property, or the value thereof, as she had when she was married, or such part or the value thereof as the court may deem reasonable, having a regard to the circumstances of the husband at the time of the divorce.”

If a narrow rule of construing this statute were adhered to, perhaps it might be held that the wife alone was to be considered on the question of property. But we deem it the more just and equitable meaning of this section, that the court is to award to the wife, upon her obtaining a divorce, only such part of the property, by whatever title the same may be held, as is reasonable, in view of the circumstances of the husband. If the wife has acquired the legal title when it has been paid for by their joint earnings and industry, it must be regarded as a trust for the benefit of the husband as well as of the wife. When, therefore, the statute directs that we shall allow the wife a reasonable portion of it, the power is given to divorce the property as well as the parties. And although alimony is not asked, it is nevertheless germane to the subject-matter of the petition, and is directly presented by the cross-bill. The statute makes the matter of an equitable allowance, relative to a complaint in such a case, in order to prevent circuitry of action. Both parties being interested in the property, it is our duty to set it off in such proportions as may be fair and reasonable under the circumstances of the litigants.

As to the amount and value of the interest to be partitioned, the justice who tried the case could estimate it properly, and we are satisfied with his conclusion.

The decree appealed from must be affirmed.

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WYLIE, J.:

I wish to express my view as to a single question. It is objected on behalf of the complainant, in whose favor the decree of divorce was granted, that the court should not consider the property question which was raised by the cross-bill of the defendant, since nothing is proper to be set up in a cross-bill which is not pertinent to the matter of the original bill.

In my opinion, this subject is not only pertinent to the subject of divorce, but when it is presented by either party in the pleadings it cannot be separated from it, but must be settled by the court. This is expressly made the duty of the court by the act of Congress. Here the title to all the property is in the name of the wife. The husband claims that in equity he is the owner of the whole or at least a moiety of this property. It was all bought after the marriage; and if the wife's money and earnings acquired subsequent to the marriage belong to the husband, it seems there is good ground for this claim on his part. Both parties took proofs on this subject, and the court below gave the wife about one-half of the property and the other half to the husband. Had the claim of the husband been rejected in this suit, the wife, holding as she did the legal title, would hold the whole simply by force of the decree of divorce, and it would have been *res adjudicata* against him in any future suit he might bring or the property.

STEPHENS vs. BEALL ET AL.**EQUITY.—No. 2434.**

- I. It is an established principle in this court that a trustee or agent, in respect of the sale of property, cannot become a purchaser, either himself or by the intervention of another party, without the most positive explanations as to the good faith and honesty of the transactions.
- II. A case of this character stated, in which the court refuses its aid in behalf of a trustee.

STATEMENT OF THE CASE.

This case was heard upon the pleadings, consisting of a bill and cross-bill and answers thereto.

The bill substantially sets forth that complainant was appointed a trustee by a decree of the circuit court of Prince George's County, Maryland, for the sale of the real estate of Oliver B. Magruder, deceased; that he sold the same to defendant, William D. Beall, of the District of Columbia, for \$10,100, of which \$1,000 in cash was paid down, and the residue in three notes on one, two, and three years, each with interest. That said notes were secured by a deed of trust on lands in this District, executed by said Beall and his wife, and that thereupon the sale was reported and confirmed by the said circuit court on the 11th day of November, 1857; that the note not being paid when due, the said circuit court ordered the lands sold to said Beall to be resold at his risk and loss, and that the same were accordingly resold to Frederick C. Crowley for the sum of \$6,478, the loss on such sale being \$3,748.65, and which has never been paid. The bill concludes with a prayer that the lands in this District, conveyed by said Beall and wife to complainant, may be sold to pay said deficiency with interest, and that an account may be taken, &c.

The answer admits the sale to said Beall of the lands in Prince George's County, Maryland, and that he paid \$1,000 and gave the notes and executed and delivered the trust-deed

upon the lands in this District, described in the complaint. It also alleges that complainant never executed or delivered to said Beall any conveyance of the land in Prince George's County, which is the reason he refused to pay said notes. It is further alleged that complainant obtained said trust-deed from defendant, Mary Beall, by fraudulent representations. The defendants deny all knowledge of the proceedings in the circuit court of Prince George's County, and allege that the sale to Crowley was fraudulent, and that complainant has procured a conveyance from said Crowley of said lands to himself. They deny that anything is due from them, and claim that complainant is indebted to said Beall in the sum of \$1,000, so paid to him as aforesaid. They further say that the defendant, Beall, never had any title to the land embraced in said trust-deed, but that the same was, and still is, in his said wife, Mary Beall, jointly with her three children. A want of parties is alleged, and that the defendant, Mary Beall, being a married woman, could neither in law nor equity pledge her separate estate for the debt of her husband.

The cross-bill filed by defendants recites the averments of the bill, and reiterates substantially the admissions, averments, and allegations of the answer, and concludes with prayer for relief.

The answer to cross-bill denies fraud or misrepresentation, or that the complainant ever promised to deliver a deed of the property in Prince George's County; admits that he has purchased the said property, and paid full consideration therefor in good faith; admits that he knew that the real estate on which the trust-deed was given belonged to Mrs. Beall.

T. T. Crittenden for complainant.

R. T. Merrick, for defendants, cited *Michand vs. Gerod*, 4 How., 503.

By the COURT:

Upon the state of the pleadings, the bill was properly dismissed by the court below. Upon the face of such a

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case, the court ought not to lend its aid to the complainant, on the ground that it is an established principle that a trustee or agent, in respect to the sale of property, cannot become a purchaser, either in person or by the intervention of a third party, without the most clear and positive explanations as to the good faith and honesty of the transaction. In this instance the court is not satisfied. The trust is not yet discharged, and the trustee has become the admitted owner of the property, and offers no explanation but his own averment in the pleadings as to the good faith of his purchase. The defendant, Beall, has never for an instant been in possession or enjoyment of the property which he is alleged to have purchased from complainant; and his equitable right has been foreclosed by an *ex-parte* order, and the property resold for a sum greatly less than he agreed to pay for it. In the meanwhile the trustee has himself become the owner, and is in possession of the lands to the exclusion of the heirs of Magruder, and while he retains the \$1,000 paid by Beall, he brings suit to compel defendants to pay the notes, for which there has never been consideration received.

The decree is affirmed. Without considering the question of parties, or whether Mrs. Beall could encumber her separate estate to secure the indebtedness of her husband, the court are of the opinion that the case presented carries condemnation on its face.

MARTHA J. DAY vs. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

AT LAW.—No. 8882.

A policy of life insurance contained a stipulation that it should be void if a certain declaration made by or for the person whose life was insured, “and upon the faith of which this agreement was made, shall be found in any respect untrue.” The declaration referred to was made for the purpose of procuring the policy, and contained answers to certain inquiries respecting the health of such person, and as to his having had certain diseases therein enumerated.

I. HELD, that such declaration constituted a part and portion of the contract, and the statements therein were made material by the contract, and the only question of fact respecting the same that can be determined by a jury is whether such statements are true or false, and not whether they are material.

II. HELD, also, that it was misdirection to instruct the jury that, in order to avoid the policy, it was necessary to show that the assured himself knew that he was misrepresenting in making such statements. The question being upon this subject whether such statements were untrue in point of fact, not whether the assured knew them to be false.

III. HELD, also, when a policy has lapsed for non-payment of the premium, and is afterward re-instated upon the condition that such re-instatement shall be void if the assured shall not then be in sound health, there can be no doubt that the policy and the representations upon which it is based and the renewal are to be considered together. The renewal of a contract necessarily imports a continuance of its terms.

STATEMENT OF THE CASE.

It will be unnecessary to state the case, as the facts sufficiently appear in the opinion of the court.

***A. G. Riddle* for plaintiff.**

***Edwin L. Stanton* and *A. S. Worthington* for defendants.**

The third and fourth points of their printed brief are as follows :

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III. Moreover, it was not for the jury to pass upon the materiality of the insured's affirmations at either the issuing or re-instatement of the policy. Those affirmations are pleaded as warranties, and hence their materiality is not to be inquired into. Even as representations their materiality must here be assumed, because the facts to which they relate were the subject of specific inquiry. *Miles vs. Connecticut Mutual Life-Insurance Company*, 3 Gray, 580; *Eddy Street Foundry vs. Hamden Insurance Company*, 1 Cliff., 300; *Campbell vs. New England Mutual Life-Insurance Company*, 98 Mass., 381; *Miller vs. Mutual Beneficial Life-Insurance Company*, 2 Bigelow Life-Ins. Rep., 704; Bliss on Life Ins., 77.

IV. Nor was the insured's knowledge of the falsity of his affirmations properly the subject of consideration by the jury, either upon the pleadings or in law. *Lindenau vs. Desborough*, 3 Man. & R., 45; *Duchett vs. Williams*, 2 Cr. & M., 348, Bunyan on Life Assurance, 31, 32; *Sayle vs. Northwestern Insurance Company*, 2 Curt. C. C., 610; *Campbell vs. New England Life-Insurance Company*, 98 Mass., 381; *Voss vs. Eagle Life-Insurance Company*, 6 Cush., 42.

Mr. Justice MACARTHUR delivered the opinion of the court :

This was an action to recover the amount of a policy of insurance on the life of Richard H. B. Day for the sum of five thousand dollars. The policy expresses that it is made in consideration of the representations made to the company in the application for the policy, and for the annual premium of \$137.50. The policy also contained the following provision : "And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declaration made by or for the said assured, and bearing date the sixteenth day of July, 1869, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, the policy shall be null and void." And there is a corresponding averment in the 9th special plea, which is admitted by the form of the plaintiff's replication, that it was agreed between the plaintiff and defendant at the time of issuing said policy that the answers of the said Rich-

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ard H. B. Day and of one H. F. Zimmerman, his friend, to certain questions propounded to them on behalf of the defendant on or about the said 16th July, 1869, should be the basis of the contract under which said policy was issued.

The defendant pleaded the general issue and eleven special pleas, in the first of which, after alleging that the policy was to be void by the agreement if the answers were untrue, it is then stated that the said Richard H. B. Day falsely affirmed that he had not had since his childhood habitual cough or bronchitis, or consumption, and no ailments, or diseases, or asthma, or spitting blood, within ten years last past, and that he had not on or about the 16th day of July, 1869, any disease or disorder, and had not had a medical attendant for himself or for his family for ten years.

The second, seventh, ninth, and tenth special pleas also charge untrue representations, but as they are the same in character as those just noticed, no further mention need be made of them.

The replication simply denies that the declarations were untrue. The only question that arises under the issues thus formed was, whether the statements were untrue as alleged in said first special plea.

On the trial of the cause the policy was introduced, dated July 16, A. D. 1869, and in order to show the falsehood of the answers in the application, the defendant put in evidence the medical proof of loss and cause of death, from which it appeared that the said Richard H. B. Day died of pulmonary consumption January 22, 1871; and the physician making the certificate states that he had been the attending or family physician occasionally for ten years. The second bill of exceptions finds that twice in the spring of 1869 Doctor A. Y. P. Garnett had prescribed for Day while he had an attack of pneumonia, and afterward had given him prescriptions for chronic bronchitis and habitual hoarseness. Doctor Young and Doctor Drinkard had both prescribed for him during the spring, summer, and fall of 1870, and in November of that year they found he had the tubercular consumption of the lungs, and the three physicians testified that in their opinion the disease of said Day was a continuous one, beginning with or before the above-mentioned attack of pneumonia, (which

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occurred before the policy was effected,) and afterward steadily progressed. In rebuttal the plaintiff introduced testimony as to his condition of health, both before and after the time the policy was issued. There are twelve bills of exceptions upon the refusal of the court to instruct the jury as requested by the defendant, but the thirteenth bill of exceptions to certain portions of the charge of the court will be noticed in the first instance, as its consideration will substantially dispose of all the others.

The learned Chief-Justice, before whom the cause was tried, instructed the jury that—

“In reference to the defense set up in these special pleadings, (and the instructions of the court extends to them all,) the court charges you that you must find that they were material and substantial misrepresentations. That the nominal and immaterial misstatement of facts, though known to the applicant at the time of the application for the policy to be untrue, would not avoid the policy. The law holds all parties in a contract to a fair and faithful representation of truth, and will permit neither to trifle with truth in dealing with each other; but the law does not allow trifling or immaterial matter to enter into the consideration of the subject. Now, in giving application to this principle, which the court has endeavored to state, you will inquire in this case, in the light of the representations of the deceased, whether he either suppressed or falsified the condition of his health, in such matter and manner as substantially to affect the application that he was making for an insurance.”

We think this direction of the court was erroneous in point of law. There are a number of reported cases in which it is held that the proposal or declaration made for the purpose of procuring a policy of insurance constitutes a part and portion of the contract. In the policy under consideration it is declared to be the true intent and meaning thereof, that if the declaration upon the faith of which the agreement is made shall be found in any respect untrue, the policy is to be null and void, and the provision in the declaration itself is, that the answers of said Day should be the basis of the contract upon which said policy issued. These express stipulations would seem to exclude all doubt that the con-

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tract comprehended both policy and declaration. If this is a correct view, then it must be held that the parties have determined for themselves what they deem material, and it follows, that all statements made by Day about his health, in regard to his having had since childhood an habitual cough, bronchitis, spitting of blood or consumption, or ailments, or diseases, within a period of ten years, or as to his having had a medical attendant for himself or for his family for ten years, are all made material by the contract, and the only question of fact that can properly be determined by the jury is, whether the statements contained in the proposal on these matters are true or false. The contract is that certain facts are true, or if not true that the company is not to be bound, and it is upon the faith of this agreement that the policy issued.

The party obtaining insurance should exercise great caution truly and carefully to answer the questions furnished by the companies. They know better than any one else as to their condition of health and the disorders from which they have suffered. Insurance companies can know little or nothing of individual cases, and have to rely upon their contracts and the good faith and honesty of applicants. They have, therefore, adopted forms of application, embracing a series of questions to be answered, not only by the person whose life is to be insured, but by his friend, and even by a medical attendant of himself or family. Without these precautions, it is doubtful whether the business of life insurance could be carried on. Where the insured has honestly and truly answered the inquiries, the companies should be held strictly to a fulfillment of the contract, as it is usually made for the benefit of families, and is regarded as a provision of support for those whom death has deprived of their natural protectors.

For the purpose of securing truthful representations upon the points which affect the risk, the companies usually insert a condition in the policy like the one in this case, rendering it void in case the answers are untrue; and the effect of this condition has been considered in a number of decided cases.

In *Kelsey vs. The Universal Life-Insurance Company*, 35 Conn., 225, the jury were instructed as follows, *inter alia* :

“ Although, as a general rule, it is true that a paper not

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attached to a policy does not form part of it, yet it may be that a paper not so attached will be made a part of it, and amount to a warranty by the express terms of it. * * *

Applying this principle to the case under consideration, if the application of Mrs. Kelsey, and her answers to the questions therein proposed, are part of the policy, or are so referred to as to be recognized and become part of it, they become warranties; that is to say, the plaintiff, by accepting the policy, warrants that the statements which are the condition and consideration of the policy are true. So far as the contract is concerned, they become conditions precedent, so to speak, which he must show have been complied with before he can recover on the contract. With reference to the policy of insurance under consideration, for the purposes of this case, the court instructs you that the conditions and agreements mentioned in the policy, having reference to the application, which was a part of the consideration on which the policy was issued, are warranties of facts which must be proved true in all particulars."

The case was carried to the Supreme Court on motion for a new trial. The Chief-Justice, in delivering the opinion of the court upon this branch of the charge, observed :

" But the court charged the jury that the conditions and agreements mentioned in the policy, having reference to the application which was a part of the condition upon which the policy was issued, are warranties of fact, and the plaintiff insists that the charge is incorrect in point of law. In the body of the policy, under the heading of conditions and agreements, is this first condition as to the application : 1. That the statements and declarations made in the applications for this policy, and on the faith of which it is issued, are, in all respects, true, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interest of the company. The reference here to the application is as clear and precise as in the case of *Jennings vs. Chenango Mutual Insurance Company*, 2 Denio, 75, and the facts stated in the application in that case were held to be warranties. It is true that in that policy the reference to the application alluded to it as forming part of the policy, while in the case under consideration the words are that the

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policy is made on the faith of the application, and that the statements in it are in all respects true. But we think this stipulation makes the truth of the material facts a matter of contract obligation on the part of the insured, and conditions upon which the policy was issued, and on the truth of which it was only to bind the company, as if the same had been embodied in the policy itself. And this has been the uniform doctrine of this court."

And the court then go on to state that while they are satisfied that the charge of the court was correct, yet they deem it proper to remark that whether the statements are to be regarded in the light of warranties or representations, is not very important, inasmuch as the answers were clearly untrue. Several Connecticut cases are referred to in this opinion, showing that statements made in written applications for insurance have been held with great uniformity to be warranties.

The same doctrine has been announced by the supreme court of Massachusetts as unquestioned law. In *Miles vs. Connecticut Mutual Life-Insurance Company*, 3 Gray, 580, it was held, upon the authorities cited by counsel for defendant, and upon many others, that the statements and declarations contained in the application for insurance, and referred to in the policy, were warranties, and if any of them, whether material or immaterial to the risk, were untrue, either from design, mistake, or ignorance, the plaintiff would not recover. This decision was made with reference to a policy resembling the one in this cause, and the cases sustaining the doctrine in that State are cited by the counsel and recognized and approved by the court.

It would seem that when the proposal is made part of the policy the statements are made warranties, and if untrue in any respect the policy is void. It is equally well settled that the statements made in a written application in answer to inquiries regarding the health and matters appertaining thereto of the person whose life is to be insured, and where it further appears, as in the present case, that the parties have expressly agreed that the policy should be void if the statements were untrue, they are conclusively made material both as a matter of law and fact by the contract into which the parties have entered.

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The recent case of *Campbell vs. New England Mutual Life Insurance Company*, 98 Mass., 381, was an action upon a policy of life insurance, expressed to be on the condition that if the statements made by the assured to the company as the basis of the contract shall be found in any respect untrue, then the policy was to be null and void. The proposal was not otherwise referred to in the policy, nor made by express language a part of it, and it was held that the answers contained in the written proposal were material by the contract. The court says: "But where the representations upon which the contract is based are in writing, their interpretation, like that of other instruments, belongs to the court, and the parties may, by the frame and contents of the papers * * * or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material, and when they have done so the applicant for insurance cannot afterward be permitted to show that a fact which the parties have thus declared to be material to be truly stated, was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question."

This principle was held to apply to the policy in that case. And in *Devenport vs. New England Insurance Company*, 6 Cush., 341-2, the language of the court is: "The assured having given an untrue answer, whether by accident, mistake, or design, it matters not, to a direct, plain, and practical question, cannot now be heard to say it was immaterial."

In *Miller vs. The Mutual Benefit Insurance Co.*, 2 Bigelow, 693, the application was by a wife for a policy of insurance on the life of her husband, and in it she agreed that the answers of her husband and of his physician and friend should be the basis of the contract, and if untrue that all moneys paid should be forfeited for the benefit of the company. There was also a provision in the policy not differing essentially from that contained in the policy here. The jury were instructed substantially as in the case at bar in this language: "It is for you to determine the materiality of the alleged misstatements, if any have been proven." In reference to this the supreme court of Iowa say: "This instruction we consider erroneous. * * * A misrepresentation by one party of a fact specifically inquired

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about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since by making such inquiry he implies that he considers it so. In all jurisprudence this distinction is recognized. It is practically to written answers to written inquiries referred to in a policy. * * * Representations of this kind differ from warranties, in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance, that is, whether the representation is in every material respect true, is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is, notwithstanding, immaterial."

The same principle was recognized in *Anderson vs. Fitzgerald*, 2 Big., 341, a case which went up from the Irish Exchequer to the House of Lords. There the policy provided that "if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the company, or if any fraud shall have been practiced on the said company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void." There was a corresponding declaration in the proposal and statement. The company alleged that the proposal and statement contained untrue representations of facts. On the trial the judge directed the jury that they "must not only be satisfied that the various false statements relied on by the defendant were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance, before they could find their verdict for the defendant."

This ruling was the great point discussed in the House of Lords. The judges were called, as is the practice in such cases, and eleven of them attended, and they unanimously held, with the chancellor and ex-chancellors, that the answers became part of the contract by the very frame of it, and that it was misdirection to leave it to the jury to say whether they were material as well as false, and if not material, that the defendant could not avail himself of them, and that the rep-

resentation being part of the contract, its truth, not its materiality, was the question.

The English rule is further illustrated in *Lindenau vs. Desborough*, 3 Man. and R., 45, *Geach vs. Ingall*, 14 Mess. and W., 95.

It seems to be now the settled doctrine in both countries that where the contract contains a stipulation that in case answers contained in the statement or application for insurance are untrue, the policy shall be void, and the falsity of the statements has the effect of avoiding the policy, as their materiality is a matter of contract. This is the agreement of the parties, that false statements made in the declaration upon which the policy issued should render it void. It is an established rule in the construction of written instruments that the stipulations and conditions which they contain are binding upon the contracting parties, and when it is plainly declared that the contract shall be void if certain written statements referred to are untrue, surely the materiality of such statements is a matter of contract obligation. The issues in the case at bar were evidently made up with reference to this view of the law. The replication to the plea we are now considering is in these words: "And now comes the plaintiff and denies that the declarations of the said Richard H. B. Day were untrue as in said first plea alleged." There is no issue raised as to the materiality of the matters set up in the plea. The only question is whether the representations of Day were untrue. This is the proper issue, and the only issue that could be tried in view of the stipulations of the contract.

We think that the question of materiality ought not to have been submitted to the jury, and that the action ought to have been tried upon the issues made up by the pleadings.

Exception is also taken to that part of the charge in which the jury were instructed—

"3. If he was possessed of any established disease, any grave and permanent invasion of his health, that looked to his premature dissolution, that was calculated to materially hasten it, and you find from the proof that in this regard he misrepresented, and if you further find that he himself knew that he was misrepresenting, it will avoid this policy, and you will find

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for the defendant; for it must be a misrepresentation with knowledge or conviction that he has falsified the history of his physical condition. And without you find that the deceased was materially diseased, and that he was conscious of it, and being conscious of it misrepresented, you will not set down his errors of judgment to the avoidance of this contract."

We are of opinion that if the statements made by Day in the application, being part of the contract, to procure the policy were untrue in point of fact, the contract became null and void. This results from the form of the contract. It was evidently the design to protect the company from the ignorance as well as willful misrepresentation of those applying for insurance. If, for instance, Day did not know or suppose that he had consumption, although in point of fact that fatal disease had already seized upon his lungs, his statement would be contrary to the fact in an important respect, for no company would insure a life subject to so much risk. It would be untrue as matter of fact, and therefore fatal to the contract. In the case of *Anderson vs. Fitzgerald*, already mentioned, Baron Parke observed :

"A doubt possibly may exist, whether the word 'false' is to be understood as false in point of fact, or morally false, though I believe most of us think it is not to be limited to moral falsehood, but there seems to us to be no doubt that if the statements are false in whatever sense we understand that word being used in effecting the insurance, the proviso operates. There then appears to us to be only two questions for the jury on this part of the policy. Were the statements false? Were they made in obtaining or effecting the policy?"

The cases cited on appellant's brief, together with others which I have examined, fully sustain the same view. Indeed I have been unable to find that the point has been otherwise decided when fully brought to the notice of the court. In addition to the cases cited by appellant, I refer to the following: *Miles vs. Connecticut Mutual Life-Insurance Company*, 3 Gray, 580; *Rawle vs. American Life-Insurance Company*, 36 Barb., 357.

The policy contained a condition, that if the premium was not paid when due, it should cease and determine; and the other special pleas of the defendants aver that the pre-

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mium falling due July 16, 1870, was not paid, and said policy lapsed, but that in October following it was renewed and re-instated upon the condition that such re-instatement should be void if said Richard H. B. Day should not be in sound health. And it is further averred that he was not in sound health, and had had derangement of health since the issue of the policy. There can be no doubt but that the policy and the representations upon which it is based and the renewal are to be considered together. The renewal of a contract necessarily imports a continuance of its terms, and the stipulations of the renewal will therefore have legal effect together with the terms of the original policy. The observations already made are therefore equally appropriate to these latter pleas, and need not be repeated.

As we are of opinion that it was error to submit the materiality of the misstatements alleged in the pleas to have been made by Day to the consideration of the jury, and also whether he knew that they were untrue,

The verdict must be set aside and a new trial ordered.

**MAYOR, BOARD OF ALDERMEN, AND BOARD OF
COMMON COUNCIL OF WASHINGTON CITY, vs.
RETURN J. MEIGS.**

AT LAW.—No. 5657.

- I. The law recognizes property in dogs. A city ordinance requiring the owner of such property to obtain a license for keeping the same is illegal.
- II. Dogs may be taxed like other property, but the owner cannot be arrested, fined and imprisoned for the non-payment of such tax.
- III. As a police regulation the owner may be required to muzzle his dog for the public safety.
- IV. Property in the dog grows out of his ascertained usefulness to man.

STATEMENT OF THE CASE.

This was a writ of certiorari at common law, to remove a judgment rendered against the defendant before a justice of the peace for a penalty of five dollars.

The defendant was arrested in an action of debt for a violation of an ordinance of the late corporation of the city of Washington, which imposes a forfeiture of not less than five dollars upon the owner of a dog of the male kind for the failure to obtain a license for keeping the same. The proceedings upon which the defendant was taken before the magistrate were commenced by a warrant of arrest, whereas it was contended that the first process should be by summons according to the practice of the common law. The writ is sued out here for the purpose of having the judgment reviewed, and the proceeding before the magistrate quashed. The remaining facts necessary to an understanding of the case are stated in the opinion of the court.

Wm. A. Cook for plaintiff.

Return J. Meigs, the defendant, appeared in his own behalf, and insisted that the motion to quash ought to prevail—

1. Because, though in England and elsewhere a man may be arrested for a debt due by contract, he cannot be arrested

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and held to bail or imprisoned for a debt incurred by an alleged violation of a penal enactment. For that would be to presume his indebtedness, in other words, his guilt, whereas his indebtedness must be judicially found upon proof of guilt; and then the judgment may be enforced by a *capias ad satisfaciendum*.

The first process must be a summons, and this has been the practice in all ages of the common law. 1 Tidd's Practice, 172, citing Yelverton, 53; Gilbert's Com. P., 87; 1 Barnes 81; 1 Chitt's Archbold's Practice, 736.

2. Because a dog is property, and the corporation of this city had no power to enact the ordinance referred to. It can no more assume to license the keeping a dog than it can to license the keeping of a horse. Property in this city is not held upon such tenure. The charter makes no distinction between domestic animals, nor did the common law. The same rules of that system that regulate property in the horse apply to property in the dog. The citizen may maintain the same actions for killing, wounding, or otherwise injuring him, and for enticing or taking him away, as he can maintain for the same wrongs to his property in the horse. You may justify an assault and battery, committed to protect your property in your dog. If you die, he goes to your executor just as your horse. You must answer for injuries done by your dog just as for injuries done by other domestic animals. A butting ram and a biting dog stand upon the same common-law platform. *Ireland vs. Higgins*, Cro. Eliz., 125; 1 Saund., 84; *Wentworth, Exrs.*, 143, 144; 1 Williams, Exrs., 436, 447; 1 Chitty's Gen'l Prac., 607, note o; 40 Vermont R., 347; *Hilliard on Torts*, 140, §§ 13, 14; 480, §§ 19, 20; *Parker vs. Mise*, 27 Ala. R., 480; *State vs. McDuffie*, 34 N. H. R., 523; *Wheatley vs. Harris*, 4 Sneed, 458; *Dodson vs. Mack*, 4 Dev. & Bat. Law R., 146; *Perry vs. Phipps*, 10 Iredell's Law R., 259; *The State vs. Latham*, 13 id., 33; *Dixon's Law of the Farm*, C. 5, pp. 110-121; *Addison's Wrongs and their Remedies*, 96-99.

3. The power of the corporation to raise revenue from property is restricted to the method of taxation.

The 7th section of the charter declares that the "corporation shall have full power and authority to lay and collect

taxes upon the real and personal property within the city." 3 Stats. at Large, 586.

And, in order to collect these taxes, the value of the property must be assessed by three respectable freeholders, who shall determine its value "agreeably to what they believe the property to be worth in cash at the time of the valuation." 4 Stats. at Large, 77, § 9.

Any ordinance of the corporation, or act of Congress, transcending these limits would be a violation of the Declaration of Rights, (§§ 12, 13,) which Congress itself can neither alter nor repeal, because the cession of the District was made and accepted upon the condition that—

"The laws of Maryland, as they existed on the 27th of February, 1801, shall be and continue in force in that part of the District which was ceded by that State to the United States, and by them accepted." 2 Stats. at Large, 103, 104, 105.

The defendant insists that the true interpretation of this compact is, that the laws of Maryland then in force in the District which the State legislature could not repeal, are not repealable by Congress.

Congress has power "to exercise exclusive legislation in all cases whatsoever" in the District.

U. S. Const., Art. 1, sec. 1, clause 17. Locke on Government, Book 2, § 141.

But the power to legislate will hardly be considered to embrace the power to repeal a declaration of rights, which is only an explicit assertion that the provisions of magna charta and other similar ones enumerated in the declaration are in force.

4. At all events, the constitution of Maryland and the declaration of rights and the acts of the legislature passed before February 27, 1801, still remain in force in the District, and it will be time enough to consider the question of repealing any of these when Congress proposes to exercise the power. Then, possibly, it may be found that what the omnipotent Parliament of Great Britain has never had the nerve to attempt, no mere legislature in this country has ever been endowed with power to do. No people in this country have

ever been so stupid as to commit such a power to any of their agents.

Hence, when this District was ceded to the nation, the people carefully enacted the solemn stipulation above mentioned, that the safeguards already provided for the security of their absolute rights against aggression should remain in force.

The method of altering, changing, or abolishing the constitution and declaration of rights is provided by the 59th section of the constitution of Maryland, and that method is also a condition of the cession.

5. The dog is liable to hydrophobia; and he loves mutton not wisely but too well; and his sublime devotion to his friends sometimes leads him to too intense distrust of strangers, most of whom he is disposed to treat as enemies.

It is said that these characteristics give to municipalities the right to put him under stringent police regulations. Granted; but should not the regulations seem to be adapted, in some measure, at least, to prevent the occurrence of the evils? Now, pray, will a collar and insignia hinder the dog from biting men or chasing sheep, or impart to him the power to discriminate his master's friends from housebreakers?

6. Does not the authority "to provide for licensing, taxing, and regulating auctions," &c., exclude the power to regulate the ownership of any of the various kinds of property? 3 Stats., 587.

When certain specific things are taxed or subjected to any charge, it seems probable that it was intended to exclude everything else, even of a similar nature, and, *a fortiori*, all things different in genus and description from those which are enumerated. Broom's Maxims, 285, 286.

Statutes, by the authority of which a citizen may be deprived of his estate, must have the strictest construction, and the power conferred must be executed precisely as it is given, and any departure from it will vitiate the proceedings; and this is so whether it be in the exercise of a public or private authority, whether it is ministerial or judicial. Potter's Dwarris on Statutes, 146, paragraph 21.

7. If the dog, on account of certain qualities of his nature, can be deemed to be a nuisance in cities, let him be so de-

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clared under the power "to prevent and remove nuisances." This would be an intelligible proceeding; but it cannot fail to be seen that the power to prevent and remove nuisances cannot be a power to license and maintain them.

Mr. Justice HUMPHREYS delivered the opinion of the court:

The defendant was arrested on the 18th day of March, 1869, taken before a justice of the peace, in this city and District, and judgment rendered against him for five dollars penalty.

The charge against him, stated in the warrant of arrest, is, that he, the said Return J. Meigs, on the 1st of January, 1869, did own, possess, harbor, and conceal one animal of the dog kind without license, and after becoming owner failed to obtain a license.

From the judgment rendered against him by the justice of the peace, the defendant obtained a *certiorari*, and the case was heard at the October term, 1872, of the circuit court, at which time judgment was rendered against defendant, and he appealed to the court in general term.

The corporation of Washington, on the 14th of January, 1858, adopted an ordinance in the language following:

"SEC. 1. It shall not be lawful for any person residing within the city of Washington to own or keep any animal of the dog kind without obtaining from the register of the city a license to do so, and such stamps and insignia as may, from time to time be designated by the mayor; for which license and insignia or stamps he shall pay the sum of two dollars per annum if a male animal, and five dollars per annum if a female animal."

Section 2 of the ordinance imposes a forfeiture of five and ten dollars for a male dog, and ten and twenty dollars for a female, if the owner or keeper fails to obtain a license.

It is contended by the counsel for the District that this regulation is a police one, within the power of municipal corporations to prescribe. Corporate authorities have, for a long while at least, assumed to make police regulations in regard to all animals, particularly the dog and the hog, and in regard to the dog the regulation has often been confined to particular seasons of the year.

This general power is conferred on municipal corporations by their charters.

These regulations are most generally made in relation to the animal running at large.

In the case before us, the corporation undertook to impose a penalty on any owner of a dog within the city who should keep a dog without first obtaining a license therefor.

The law recognizes property in and to dogs, and the owner thereof is entitled to his remedies for an invasion of his rights of property. This is too well settled in England and in the States of this Union to be now questioned.

The right of property in animals cannot be declared unlawful unless a license is first obtained. We do not undertake to say that a given or particular mode of using any kind of property might not be prohibited, but for the general possession of that in which the right of property exists, which is not a mere franchise, how can it be declared unlawful, and a license demanded, before the person is authorized to own or keep?

If dogs are property they may be taxed, and the tax assessed to the owner. But would it be claimed that for the non-payment of the tax the owner could be arrested, fined, and imprisoned?

We think with the learned defendant, who argued the case for himself, that Congress did not confer upon the corporation the power to interfere with rights of property as recognized at the time of the cession of the District. We are not called upon, however, to pass upon the question of the powers of Congress under the grant, "to exercise exclusive legislation in all cases whatever."

The dog may be taxed, and we do not say that other property might not be held liable for the tax.

We do not say that the owner may not be required at certain seasons to muzzle his dog, and for suffering him to run at large without it he may be subjected to a fine. This power would exist, to make some police regulation in a proper way, for the safety of a community.

But here was an ordinance declaring the owner a criminal and subjecting him to arrest, imprisonment, and fine for keeping his property at home, unless he first obtained a license.

We are not called upon in this case to pass upon the power of the proper government of a State to declare any species of property heretofore recognized as property to be a nuisance, and to abate it as such whenever it becomes destructive to society, for that question is not made upon the record, nor was it made in the court below. It came up in argument incidentally, and the remarks of counsel for the plaintiff and defendant gave an interesting impression upon the nature and character of the animal about which this case arose.

Not only has the dog been the subject of discussion in the courts, as involving the question of property, but his virtues have been celebrated in song. The wrongs done him have been touchingly described by poets, and hours have been occupied at the camp-fires of hunters in narrating the achievements of favorite hounds.

That the law has recognized the relations of property in any species of it, arises from the ascertained usefulness in some way to the wants of man of that particular object or subject of property. The right to the property is recognized for its protection.

History informs us of noble acts of fidelity and affection performed by some sentinel of the class under consideration.

Our attention has been called by our brother, Olin, to the event of so much interest to the world, and to the cause of freedom of opinion, and to the exercise of a conscientious faith, the rescue from the grasp of the enemies of toleration of William of Orange, on the morning of the 12th September, 1572, by the action of a little dog.

The Spanish army, under the command of Alva, invading the Netherlands, and the army of patriots under the command of the prince, were encamped near the city of Mons. The plan was formed for the surprise of the camp of the patriots and the capture or assassination of William, and for this purpose a band of six hundred *disguised* men were placed under the command of Julian Romero.

The historian of the Rise of the Dutch Republic narrates that, near the hour of two o'clock in the morning, "the boldest, led by Julian in person, made at once for the prince's tent. His guards and himself were in profound sleep, but a small spaniel, who always passed the night upon his bed, was a

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more faithful sentinel. The creature sprang forward, barking furiously at the sound of hostile footsteps, and scratching his master's face with his paws. There was but just time for the prince to mount a horse which was ready saddled and to effect his escape through the darkness before his enemies sprang into the tent. His servants were cut down, his master of the horse and two of his secretaries who gained their saddles a moment later, all lost their lives, and but for the little dog's watchfulness, William of Orange, upon whose shoulders the whole weight of his country's fortunes depended, would have been led within a week to an ignominious death. To his dying day, the prince ever afterward kept a spaniel of the same race in his bed-chamber."

This event occurred but a short time after the Paris wedding, and a shorter time after the St. Bartholomew tragedy.

The historian and moral philosopher can more appropriately discuss the influence which the watchfulness of the little spaniel had upon the destinies of the world. We can only state a reason for the law throwing around this animal its sanction that the right of property exists thereto, and that the right of property existing, it will be sure to receive the protection of man.

The power of any government to collect its revenue, and to punish for fraud or concealment, or to arrest for violation of rules in relation to the exercise of a mere franchise, is a different question to that involved in this case.

In the case before us, the entire record discloses a view on the part of the corporation ignoring the question of property, and proceeding as though a criminal deed had been done by the defendant, and the dog to be excluded from the list of subjects and objects of property. "If, then, the dog is a species of property, for the injury to which," to quote the language of one of the authorities cited by defendant, "an action at law may be sustained," (*Parker vs. Myers*, 27 Ala. R.,) you cannot proceed against the owner of that property as though he were a culprit, such dog being upon his premises, where, of all the places in the world, he more properly belongs.

The ordinance in the form existing is inoperative, null, and void, according to law.

The defendant is discharged and the warrant quashed.

**E. V. KIMBROW vs. THE FIRST NATIONAL BANK OF
WASHINGTON.**

AT LAW.—No. 5986.

- I. By the rules of the common law, a married woman to whom a draft, promissory note, or other promises are made, cannot maintain an action thereon in her own name during coverture. When the cause of action is in her own right, her husband was required to be joined with her in the suit.
- II. The act of Congress regulating the rights of married women in this District has not changed the rules of the common law, so as to enable a married woman to maintain an action in her own name, upon a chose in action which she had prior to the passage of the law.
- III. At common law the husband owned the personal estate of the wife, and had the right to reduce it to possession. The act of Congress referred to is not to be construed so as to affect the vested rights of the husband, by giving it a retroactive operation.

STATEMENT OF THE CASE.

The action was upon a Treasury draft in favor of the plaintiff on the defendant for the sum of \$3,414. The defendant was a Government depository and paid the draft upon a forged indorsement. The declaration besides the common counts had one in trover. At the trial the counsel for defendant objected to giving any proof under the declaration on account of the misjoinder, but the court permitted the plaintiff to elect any other count, and thereupon she elected to proceed on the one for money had and received. To this ruling the defendant excepted.

The second bill of exceptions shows that the plaintiff, who was a witness, swore that she resided near Nashville, Tenn., and that she was the party named in said draft as payee; and in answer to the defendant she said she was a married woman, living with her husband near Nashville, Tenn., and that she had never been divorced.

In answer to the plaintiff's counsel she said she had transacted all her husband's business for the last seven or eight years on account of his mental imbecility.

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The defendant's counsel then asked her if her husband was not the owner of the property that had been taken by the United States in Tennessee, for which taking said claim had been allowed, and was not the draft in question given in payment thereof?

To this question the plaintiff objected, and also that the witness should not answer the same, and the court sustained the objection, and the defendant excepted.

The plaintiff, as witness, further said that the draft belonged to her, and that her name on the back of said draft was not written by her, nor had she ever in any way authorized the same, and that she had never in any way parted with her interest in said draft.

There were several other bills of exceptions which are not noticed, for the reason that the facts above stated are all that is necessary to an understanding of the decision.

J. Daniels, M. Thompson, and J. L. Johnson for plaintiff.
Arguendo :

It is objected on the part of the defendant that the plaintiff cannot recover in this form of action.

The action of assumpsit is the proper action for the recovery of money had and received by the defendant for the plaintiff's use, and which in good conscience the defendant ought not to retain. (See *Moses vs. McFarland*, 2d Burr's Reports, page 1006; 2d Greenleaf Evidence, 10th ed., secs. 117 and 118, and authorities there cited.)

It is further objected that the court erred in directing the plaintiff to elect upon which of the counts of the declaration she should proceed.

It may be true that a count sounding in tort cannot be joined with one in assumpsit in the same declaration, but the defect should be taken advantage of by demurrer, and as it was not it was perfectly competent for the court to compel the plaintiff to elect on which she would proceed. (See *Gould vs. Crawford*, 2 Barr., page 89, and *Noble vs. Laley*, 14 Wright's Rep., page 281.)

The draft which was the subject of this action was executed, made payable to the order of the plaintiff, and delivered

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to her agent, and therefore became her absolute property, and was properly received in evidence to establish her claim. The question of her right to sue without joining her husband of course depends entirely upon statute, and the plaintiff relies upon the act of Congress approved April 10, 1869. It is objected by the defendant that the plaintiff lives in Tennessee, and that the laws of Tennessee must govern her right to sue as femme sole. To this we answer that this is a remedial statute, and the law of the forum must govern. (See *Bank of the United States vs. Andrew Donnelly*, 8th Peters' Rep., page 365, and authorities there cited.)

A. G. Riddle and *Francis Miller* for defendants. *Arguendo*:

It is evident that Mrs. Kimbro, being a married woman, cannot sue in her own name, unless authorized to do so by some statute.

The one relied upon to give this authority is the act of Congress approved April 10, 1869; but this statute was passed subsequently to drawing of this draft, and the draft, at the time it was drawn, was, by operation of law, the property of the husband, and he must be a party to the suit to recover the proceeds. Besides, there is no proof that the law of Tennessee, the domicile of the plaintiff, allows a femme covert to hold personal property in her own right, unless secured to her sole use.

Admitting, for the sake of argument, that this act does apply, the court plainly erred in refusing the question inquiring into the husband's ownership of the property for which the draft was given. For, if it was his property, the proceeds of the draft were his, and he should sue to recover them.

The court makes the right of the plaintiff to recover depend upon the claim being her sole claim. That fact, then, must have been a proper subject of inquiry.

Mr. Justice OLIN delivered the opinion of the court:

This case comes before us on a bill of exceptions taken on the trial of the cause. The facts embodied in the bill of exceptions, briefly stated, are these:

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The Government of the United States issued a draft, No. 9243, on war-warrant No. 915, in the following form :

\$3,414.] TREASURY OF THE UNITED STATES,
Washington, March 9, 1867.

Pay to the order of Mrs. E. V. Kimbro three thousand four hundred and fourteen dollars.

[No. 9243.] Registered March 9, 1867. Issued on requisition No. —.

\$3,414.] S. B. COLBY,
Register of the Treasury.
F. E. SPINNER,
Treasurer of the United States.

To the FIRST NATIONAL BANK
of Washington, D. C.

This draft, purporting on its face to have been indorsed by Mrs. Kimbro, after passing through several banks, reached the First National Bank of Washington, where it was paid, and on settlement between the bank and the United States the draft was delivered up and canceled.

It was claimed on the trial of the cause that Mrs. Kimbro never, in fact, indorsed the draft; that her signature as indorser appearing thereon was a forgery; and therefore the action was brought against the defendant to recover the proceeds of the draft.

There were several counts in the complaint, one of which was substantially a count in *trover* for the draft. It used in substance, if not in express terms, the words prescribed by the rules of this court for a complaint in an action of *trover*, and with this count in *trover* were also joined the several common counts in *assumpsit*.

On the trial of the cause, the justice presiding, instead of non-suiting the plaintiff for a misjoinder of causes of action, allowed the plaintiff to amend her pleadings in the case by electing whether she would proceed with the trial in *trover* or *assumpsit*. The plaintiff elected to proceed in *assumpsit* upon the count familiarly known as the count for *money had and received*. Upon this theory the case was tried. On the trial numerous exceptions to the rulings of the justice were taken,

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to most of which we deem it unnecessary to advert, because upon the admitted facts of the case we think this action cannot be maintained.

The case presents this question, viz: Whether by the rules of the common law, or by the law of this District, existing prior to the 29th of July, 1869, a married woman to whom a draft, promissory note, or promise made for a valuable consideration, can maintain an action thereon during coverture, in her own name.

As the justice presiding at the trial of the cause held that the wife might maintain the action, it becomes necessary to examine this question.

In the third exception taken, it is recited that the plaintiff was then produced as a witness, and swore that she resided near Nashville, Tenn.; that she was the party named in said draft as the payee, and in answer to the defendant's questions she said that she was a married woman, living with her husband, and that she had never been divorced. In answer to the plaintiff's counsel, she said that she had transacted all her husband's business for the last seven or eight years on account of his mental imbecility. The defendant's counsel then asked her if her husband was not the owner of the property that had been taken by the United States, for which taking a claim had been allowed, and whether the draft in question had not been given in payment therefor. To this question the counsel for the plaintiff objected, and the court sustained the objection, and the defendant thereupon excepted to the ruling of the court. This ruling can only be material in reference to one aspect of the case, which will be hereafter considered.

At common law a married woman could not maintain an action in her own name for *any cause* that accrued to her *before* coverture. During coverture she could not maintain an action in her own name for any conceivable interest or right accruing to her during coverture, and for the reason that, according to the rules of the common law, if she failed in her action, nobody could be made liable for the costs of the suit. Thus, when she had a cause of action in her own right, her husband was required to be joined with her in the suit, that

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in the event of its miscarriage he might be made responsible for the costs.

At common law, where a promissory note is made to a *femme sole*, and she afterwards marries, being possessed of the note, the title vests in her husband, and *he alone can indorse it*. (See *Connor vs. Martin*, 1 Strange, 516; *Segg vs. Segg*, 9 Mass. R., 99.) And so where a note is made payable to a married woman, the legal interest in it vests in the husband. (See *Barlow vs. Bishop*, 1 East., 432.) Such negotiable note being part of her personal estate, *payable to her order*, is in legal effect payable to her husband. (See 10 Mod. R., 245; 4 Tenn. R., 361; 2 Bur., 1776; Edwards on Bills and Promissory notes, 72.) Chitty on Pleading, 33, tells us what the consequence is of a mistake in parties plaintiff to a suit in the case of *baron and femme*. He states that when a married woman might be joined with her husband, but sues alone, the objection can only be pleaded in abatement, and not in bar, though her husband might sustain a writ of error, and if she marry after writ and before plea, her coverture must be pleaded in abatement, and cannot be given in evidence under the general issue. But where the wife improperly sues alone, having no legal right of action, she will be non-suited; and if she improperly joins in an action with her husband, who ought to sue alone, the defendant may demur, or the judgment will be arrested or reversed on writ of error. And if the husband sue alone when the wife ought to be joined, either in her own right or in *autre droit*, he will be non-suited; or if the objection appear on the record, it will be fatal in arrest of judgment or upon error. Numerous adjudicated cases are cited by Chitty in support of the rules above mentioned, which need not be here quoted.

Upon the theory of the common law a *femme covert* could not maintain a suit for any cause in her own name, and in no case can she sue alone. The reason of the rule, as before observed, is that such *femme covert* could in no way be made responsible for the consequences of a judgment against her. No execution can issue against her, for, according to the common law, she was a nonentity, her legal existence being merged in that of the husband. No court of equity, so far as I know, has ever made the costs of a suit at law by the

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wife a charge upon her separate estate, if she chanced to have any.

In the case of *Griswold vs. Pennington*, 2 Conn. R., 565, the rights of husband and wife, as between themselves and in respect to third parties, are clearly stated by Chief-Justice Swift. He says the husband by marriage acquires a right to the use of the real estate of the wife during her life; and if they have a child born alive, then, if he survive, during his life as tenant by courtesy. He acquires an absolute right to her chattels real, and may dispose of them. If he does not dispose of them, and survive his wife, they survive to him, but if she outlives her husband they survive to her. He acquires an absolute property in her chattels personal in possession; but as to her choses in action, he may maintain a suit jointly with her to recover them, and if he reduces them to possession during coverture, they become his; otherwise, they survive to the wife if she outlives him, or to her administrator if she does not. As to the property of the wife accruing during coverture, the same rule is applicable, *except in regard to choses in action*. These vest absolutely in the husband, on the principle that the husband and wife are but one in law, and her existence in legal consideration is merged in his. He may in such cases bring a suit in his own name without joining his wife. This clearly proves that choses in action vest in him absolutely, for if the right was in the wife she must necessarily join in the suit. Where a bond or note is given to the wife, the husband cannot maintain an action in his own name. The consequence, then, is that if the husband die before the wife, such choses in action shall go to his executor or administrator, and they do not survive to the wife, for where the property has been absolutely vested there can be no survivorship. (See Cord on the Legal and Equitable Rights of Married Women, S. 1008; *Barlow vs. Bishop*, 1 East., 432.) This latter case is so much in point, it may be well to quote the substance of it. It was an action by the indorsee of a promissory note against the maker, which note was drawn payable to one Anne Parry or order, two months after date, for forty-one pounds and ten shillings, and by her indorsed to the plaintiff, (*Barlow*.) The first count in the declaration was upon the note, to which were added the money

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counts. It appearing in evidence before Lord Kenyon, at the trial at the Middlesex sittings, that Anne Parry was a married woman carrying on trade at Birmingham in her own name, with the consent of her husband, and that the plaintiff, who lived in London, had furnished her with goods to the amount of the note, dealing with her as a *femme sole*; that the plaintiff, after much delay, having pressed for payment, the defendant, with a view to serve Mrs. Parry, gave her the note in question, with the knowledge of her being a married woman, and with a view that she should pay it over to the plaintiff, in order to stop his proceedings against her, which she did by indorsing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a non-suit if it should be of opinion that the plaintiff could not recover upon any of the counts in the declaration. A rule was accordingly entered, and the question presented in the case was argued by Gibbs for the defendant, and by Erskine and Espinasse for the plaintiff.

I will quote the points made by Erskine and Espinasse to sustain the verdict in the case, because they seem to present in the most ingenious and plausible manner all that could be said in favor of sustaining the verdict.

The argument was that although by delivery of the note to the wife for her use, the property vested in the husband; they contended, first, that, as she carried on trade in her own name, with her husband's consent, all acts done by her in the course of such trade must be taken to be with the knowledge and consent of her husband, and he having permitted her to indorse the note in question, it in effect became his own indorsement. But, secondly, if the property in the note could not pass by her indorsement, though made with her husband's consent, then, as the defendant knew that she was a married woman, and that the object of making the note payable to her was that she might indorse it to the plaintiff, which by law was a nullity, it is the same in legal effect as if the note were made payable to a fictitious person, in which case it becomes payable to bearer, as in *Gibson vs. Minet*, 3 Tenn. R., 481, or as if it were made payable to the plaintiff himself, for whose use it was expressly given. Perhaps, too, under the special circumstances of the case, the giving this note may

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be considered as evidence under the money counts of the defendant's having received so much money for the use of the plaintiff in payment of his demand upon Anne Parry ; or, as in *Fenner vs. Mears*, 2 Blackstone, 1269, it amounts to an agreement by the defendant to hold so much money for the use of the person to whom Anne Parry herself should indorse the note.

To this reasoning Lord Kenyon, C. J., says: "I saved the point at the trial, not from any doubt entertained by myself at the time, but to give an opportunity to the plaintiff's counsel to see if there was any ground upon which the action could be sustained, but none has been or can be stated. It is clear that the delivery of the note to the wife vested the interest in the husband, and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, I am not prepared to say that that would not have availed, as many acts of this nature may be done by a power of attorney, and the jury might have presumed what was necessary in favor of an authority from her husband for this purpose. But the indorsement being *in her own name*, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person, to whom no interest can pass, but here the interest passed to the husband. The rule for a nonsuit was made absolute."

By this decision, and numerous others which might be quoted, it appears that Mrs. Kimbro, by the rules of the common law, could not maintain an action in her own name upon the draft nor upon the common counts in assumpsit.

I infer from the ruling of the Chief-Justice, who presided at the trial, that he was of the opinion that the act of Congress regulating the rights of married women in this District so changed the rules of the common law as to enable Mrs. Kimbro to maintain this action in her own name. This act is as follows :

AN ACT regulating the rights of married women in the District of Columbia.

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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That in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were femme sole, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.

“SEC. 2. *And be it further enacted*, That any married woman may contract, and sue and be sued, in her own name, in all matters relating to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same way as if she were sole.

“Approved April 10, 1869.”

It will be remembered that the draft was delivered to Mrs. Kimbro on or about the 9th of March, 1867; that the act of Congress in reference to the rights of married women was passed April 10, 1869. It is apparent, therefore, that this act has no relevancy to the question, unless we give it a retroactive effect. Such a construction of a statute will always be avoided if the language of it will render it possible, and for the obvious reason that such a construction would not unfrequently divest vested rights. It would, in effect, transfer rights from one person to another by simple legislative enactment. It has been uniformly held by courts in the construction of statutes that they should have no retroactive effect, unless such intention was clearly and explicitly declared in the language of the statute.

By an act of the legislature of the State of New York, passed in 1848, in reference to the rights of married women, an attempt was apparently made to vest in the wife the sole and exclusive property, of all choses in action, belonging to her before marriage, and not reduced to possession by the husband at the time of the passage of the act. The court of appeals of the State of New York decided with unanimity

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that the act should not be construed to affect vested rights, and that if it was intended to do so it was unconstitutional and void.

It appears from this case that prior to the act of 1848, in reference to the rights of married women, a legacy had been left to the wife, but before the legacy had been reduced to possession by collection the act of 1848 was passed, and the husband having the right to reduce the legacy to possession, the legislature had no power to divest him of that right, and that the law was void as to all personal property that married women had or were entitled to at the time of the passage of the act; for by the marital contract made between the husband and wife the husband was then the owner of all the wife's personal estate, and entitled to reduce the same to possession. (See *Westervell vs. Gregg*, 2 Kernan, 202.)

In the case last referred to there seems to have been an attempt on the part of the legislature to vest the interest of a husband arising out of the marital contract in the wife; this the court say cannot be done. If, therefore, we were disposed to give the act of 10th April, 1869, a retroactive operation which no language of the act warrants, it would violate the principle of law laid down in 2d Kernan, before quoted. But the language of the act is free from all obscurity on this point. It provides "that the right of any married woman to any property, personal or real, belonging to her at the time of her marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as though she were a *femme sole*," &c.

It appears by the third exception taken at the trial that the counsel for the defendant asked the plaintiff, Mrs. Kimbro, who took the stand as a witness in her own behalf, whether her husband was not "the owner of the property that had been taken by the United States, for which taking said claim had been allowed, and was not the draft in question given in payment therefor?" This question was objected to, and the objection was sustained by the court, and an exception to the ruling taken.

It is difficult to understand upon what theory of law this question was overruled. If the act of Congress could be construed to have a retroactive effect, it could in no way benefit

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the plaintiff's case, for the draft was given in payment for the husband's property, and was in no sense the separate estate of Mrs. Kimbro, unless the payment of an honest debt by the United States must be regarded in law as a gift or donation.

Under the instructions of the presiding justice, the jury rendered a verdict for the plaintiff.

The judgment in the case must be reversed.

WALLACH ET AL. vs. VAN RISWICK.

• IN EQUITY.—No. 2990.

A person who engaged in the rebellion and whose real estate has been sold under the acts of Congress of August 6, 1861, and July 17, 1862, in pursuance of a judicial decree of confiscation, forfeits thereby its use during life ; but such decree and sale does not work a divestiture of title, and he has afterward the right to execute a mortgage or conveyance of the same property ; which, however, will only take effect on the termination of the life of the original owner.

STATEMENT OF THE CASE.

On the 28th of September, 1854, Charles S. Wallach and his wife, Susan L. Wallach, executed a deed to certain lots and parcels of land in the city of Washington to James M. Carlisle, trustee, to secure the payment of five thousand dollars, which said Wallach borrowed of Henry W. Lansdale. On the 12th day of July, 1862, the trustee sold parts of the land mentioned in the deed, and received therefor the sum of four thousand five hundred dollars, and entered the same as a credit on the note and said deed.

On the 1st day of December, 1862, John Van Riswick, the defendant, purchased the said note, and received an assignment of said deed for the balance due and unpaid on said note, amounting to one thousand five hundred and thirty-three dollars and sixty-five cents, besides ninety-four dollars and eighty-five cents costs.

The said Charles S. Wallach had resided in the city of Washington, District of Columbia, for many years, and had, previous to the 17th day of July, 1862, entered into the military service of the Confederate States, and was an officer in the army thereof doing duty in the State of Virginia, and remained in said army till the termination of the armed rebellion.

On the 12th day of May, 1863, a libel of information against the parcels of land in controversy in this suit was exhibited on behalf of the United States in this court, and on the 29th

day of July, 1863, the same was condemned by the decree of the court as forfeited to the United States for and during the natural life of said Charles S. Wallach, and the same was sold by the United States marshal of this District on the 9th day of September, 1863, and the defendant became the purchaser for the sum of \$2,200, and received a deed therefor from said marshal.

On the 3d day of February, 1866, the said Charles S. Wallach and his wife, Susan L. Wallach, executed a paper writing, purporting to be a deed to the said parcel of land so condemned and sold by said decree, conveying the same to the defendant, John Van Riswick, the consideration expressed being \$11,000.

Charles S. Wallach died February 3, 1872. Complainants are the children and heirs of the deceased Charles. They bring their bill of complaint against John Van Riswick, who is in possession of the lot of land condemned and sold by said decree of this court, and seek now a decree declaring the deed of February 3, 1856, to defendant, to be null and void, and directing an account of the rents and profits since the death of their father, and they offer to pay any balance found due on the note to Lansdale, and pray for general relief.

A demurrer was interposed by the defendant to the bill of complaint, and sustained by the justice holding the special term, and the bill was dismissed, with costs. From this decree an appeal was taken to the general term.

The principal question presented by the record is whether the sale of the property made in pursuance of the decree of confiscation divested absolutely and completely the title out of the original owner, so that no right remained in him, either to mortgage or convey the same.

Messrs. *Pike* and *Johnson* for complainants :

The plaintiffs' case rests upon the proposition that by the decree of condemnation and sale, Mr. Chas. S. Wallach was deprived of all beneficial interest in the property, and that a settlement was effected in favor of his right heirs, the effect of the limitation prescribed by the concurrent joint resolution

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to the forfeitures directed by the 5th, 6th, and 7th sections of the act of July 17, 1862, being the same as that prescribed by the clause in section 3, Article III, of the Constitution, to forfeitures on attainders for treason, and that limitation prescribed by section 3, Article III, of the Constitution being the same as that prescribed by the statute of 7 Anne, C. 22, to forfeitures on attainders for treason in England. *Miller vs. United States*, 11 Wall., 268 to 213; *Bigelow vs. Forrest*, 9 Wall., 339 to 353; *McVeigh vs. United States*, 11 Wall., 259 to 267; *Armstrong's Foundry*, 6 Wall., p. 769; *United States vs. Klein*, 13 Wall., pp. 138, 142; *Blackstone's Com.*, book 1, pp. 29, 47, 229; *Blackstone's Com.*, book 2, pp. 8, 12, 44, 57, 108, 110, 111, 112, 116, 251, 252, 309, 311, 312; *Blackstone's Com.*, book 4, pp. 382, 383; *Kent Com.*, vol. 4, pp. 12, 258, 426, 442; *Preston on Est.*, vol. 1, *p. 255; *Preston on Est.*, vol. 2, *pp. 298, 303, 307, 313, 343, 357, 380, 453, 455; *Washburn R. P.*, vol. 1, pp. 14, 16, 22, 27, 28, 66, 67, 69; *Dwarris on Stats.*, *p. 702; *Fearne on O. R.*, pp. 310, 452 to 458; *Cornish on Rem.*; *Williams R. P.*, p. 18; *Butler's Fearne*, 563; *Spence Eq. Jus.*, vol. —, pp. 21, 140; *Hallam Hist. Mid. Ages*, vol. 2, pp. 83, 84, 98, 99, 117; *Hallam Hist. Mid. Ages*, vol. 3, p. 264; *Hallam Hist. Mid. Ages*, supplemental notes, 140, 143; *Yorke Considerations on Forfeitures*, pp. 8, 14, 19, 53, 54, 56, 61, 88, 90, 154, 196 to 230; *Story on the Constitution*, sections 1799, 1299; *Appleton vs. Crowninshield*, 3 Mass., 464; *Dana's note to Wheaton's Int'l Law*, sec. 388; *Hargrave's note*, 1 *Coke on Litt.*; *Burgess vs. Wheate*, 1 *Eden.*, ch. 191; *Wellion vs. Berkley*, *Plowd.*, 233, 235, 249; 3 *B. & P.*, 652; *Sheffield vs. Radcliffe*, *Hobart*, 340, 212; *Foster's Crown Law*, 98, 222; *Gordon's case*, *Foster's Crown Law*, p. 100; *Taylor vs. Atkys*, 1 *Burrows*, p. 115; *Brown vs. Waite*, 2 *Mod.*, 130; *Burnet's Hist.*, vol. 2, pp. 836, 837; *Life of Chancellor Hardwicke*, (Harris,) vol. 2, pp. 68, 69; *Sir Salathiel Lovel's case*, 1 *Salkeld*, 85; *Wheatley vs. Thomas*, 1 *Levinz*, *p. 73; *Walsingham's case*, *Plowd.*, 563, 554, 556; *Colchrist vs. Bejustin*, *Plowd.*, 25, 27, 28, 29.

The confiscation was final and conclusive as to Mr. Charles S. Wallach, no right of present or future enjoyment being left to him. *Micon et al. vs. J. P. Benjamin et als.*, sup. ct. Louisiana, 1871; *Tyler vs. Defrees*, 11 Wall., 345; *Benedict Admty.*,

sections 359, 360, 364, 365, 434; *Miller vs. United States*, 11 Wall., 306; *Attorney-General vs. Norstedt*, 3 Price, 97; Coote Admty. Pr., p. 129; Parsons on Maritime Law, p. 643; The Parlmira, 12 Wheat., 1, 14; *Bigelow vs. Forrest*, 9 Wall., 350; Washburn R. P., vol. 1, p. 59; Preston on Est., p. 18, vol. 2; Amy Warwick, 2 Sprague, 145, 150; Prize cases, 2 Black., 671; Hayden's case, 3 Rep., 7; *Pierce vs. Hopper*, Strange, 253.

Thomas J. Durant and *T. A. Lambert*, for defendants, argued that—

The deed of February 3, 1866, was valid, having been made by and between parties able to contract about a proper subject-matter and for a valuable consideration, to wit, \$11,000; and the fee-simple estate in the property therein described was by it conveyed to the defendant, the grantee.

The act of Congress of July 17, 1862, gave to the proceedings of condemnation provided for in its 7th section an effect or operation purely *in rem*; the individual owner was in no sense the object of such proceeding. The latter occupying the relation of a public enemy and having withdrawn himself from his allegiance to the Government, left the former in some sort *derelict*, under which circumstance it was seized upon by the United States and the *usufructuary right* thereto, during a period commensurate with the life of the then owner, appropriated for the support of its Army.

This wrought a temporary incapacity of *present enjoyment* in the owner of the fee, but no *divestiture* of the *fee itself*.

The act (except in its first four sections, with which we have naught to do) was simply a *measure of belligerent policy*, and in no respect a municipal regulation. (*Vide Miller vs. The United States*, 11 Wall., 305, 306.)

All that the United States could take under and by virtue of proceedings under the act of July 17, 1862, was a "right to the property seized, terminating with the life of the person, for whose act it had been seized." *Bigelow vs. Forrest*, 9 Wallace, 350.

That it was necessary preliminarily to the exercise by Government of its war-powers to make such enactment as that of

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July 17, 1862. (See *Brown vs. The United States*, 8 Cranch., 122.)

If the United States took the estate of Charles S. Wallach *by way of use*, it must have held by analogy with a holding under a conveyance operating by virtue of the statute of uses. In that event the fee must have *remained in the grantor*, (IV Kent, Com., 257,) who could have been none other than Charles S. Wallach. That being so, he must have had absolute disposition of the fee.

Mr. Justice WYLIE announced—

That a majority of the court were in favor of affirming the decree appealed from, but that a written opinion had not been prepared. He would, therefore, simply announce the decision without reviewing the authorities or the elaborate and interesting argument of counsel upon either side of the case. The court were of opinion that the deed executed by Mr. Wallach and wife on the 3d day of February, 1866, was a valid deed, and that the grantee took a good title, as against the complainants to the present bill. The decree sustaining the demurrer and dismissing the bill is, therefore, affirmed.

Mr. Justice HUMPHREYS, with whom Mr. Justice MACARTHUR concurred, read the following dissenting opinion:

When the land was libeled in this case, the deceased had and owned an estate in fee, incumbered by a mortgage for a small balance of a note. This estate was seized, and at the sale was sold. Had the decree been absolute, still the sale would have passed no more of a forfeiture than was passed in the case of *Forrest and Bigelow*, 9 Wallace. It is to be observed that the land in the case before us was an estate of the third class, as designated by the court in *United States vs. Klein*, 13 Wallace. It was confiscated by regular process, nothing remaining to be done to divest all right of the owner. The right and property in the land was changed by regular judicial proceeding and sentence, and by the execution of the sentence, and nothing was left that could be the subject of even a pardon.

The whole or all the estate which the deceased had in and to the land was seized, and was sold as being forfeited to the Government, because the owner thereof was guilty of treason in levying war against the United States and aiding in the rebellion. The resolution saved and limited the extent of the forfeiture to be in harmony with the limitation of the second clause of section 3, article 3, of the Constitution.

When power was given in section 8, article 1, to the Congress to provide for calling forth the militia to execute the laws of the Union and suppress insurrections, subsequent provisions were made to harmonize section 4, article 4, and the other two sections cited; all work together and provide for the different contingencies to arise. And as any trial of the person for treason under article 3 would be controlled by the limitation of article 3, how was this act justified? By reason of the rebellion of the owner; by which act of treason he forfeited his property, his estate, and his life. The Government saw fit not to take life after the conflict of arms had ended. There was, it is true, no attainder of treason, but the same limitation to the forfeiture was annexed as though there had been.

If any estate was left in the deceased, the ancestor, which he could dispose of, he could dispose of it by will as much as by deed. And let us see what would have been the practical effect of this power on his part. His land was confiscated because he had joined himself to the Confederate States.

Suppose that one or more of his sons had joined the armies of the Union, and for so doing he had excluded him or them from participating in his estate. This would be giving a contradictory practical effect to an act of Congress designed to deprive the party of the power of doing injury. So a threat of disinheriting, if the son took up arms for the Union, might have deprived the Government of services which it needed. The forfeiture was complete when the sale was made, so far as any power of the offender over the estate was concerned. The fact that the estate may descend to heirs who were as hostile as their ancestors is owing to the action of the Government itself, under the Constitution, and not to that of the ancestor.

The intent and meaning of the act of July 17, 1862, may

be somewhat derived from recent legislation by Congress. The act of March 3, 1871, for the appointment of a board of commissioners, provides that they "shall receive, examine, and consider the justice and validity of such claims as shall be brought before them, of those citizens who remained loyal adherents to the cause and the Government of the United States during the war, for stores or supplies taken or furnished during the rebellion for the use of the Army of the United States in States proclaimed as in insurrection against the United States, including the use or loss of vessels or boats while employed in the military service of the United States." The claims to be allowed are strictly confined to those who prove their adherence, during the war, to the cause and the Government of the United States. The property of those obnoxious to the provisions of the act of 1862, used by the Army, is, by this act of 1871, considered as having been forfeited to the Government—and if the provisions of the act should ever be extended to embrace the whole population it may be in favor of children or heirs. But, certainly, so far as the offenders are concerned, they have no claim which would pass by assignment, or which the offender could alienate by deed or will. Now, we apprehend that it is equally as plain that the legislative power intended to make the same disposition of the property confiscated by the decree of the courts—and the act of 1871 is referred to because of recent date, and for that it relates to the subject of the use of property in the States which were in rebellion, which property was seized and appropriated to the use of the Army of the United States. It may be instructive, in considering the extent of the act of confiscation, to refer to the case of the United States and Klein, both the opinion of the court and the dissenting reasons of Justices Miller and Bradley, although, in that case, construction was being given to the act of March 12, 1863. Incidentally, the complete divestiture of estate and ownership in property confiscated is discussed with clearness and system.

The fifth section of the act of 1862 provides for the seizure of all the estate and property, and the seventh section provides for the condemnation and sale of such property. When the property or estate of either class of offenders has been

seized and proof shall have been made, upon which a decree of condemnation and sale follows, then all sales, transfers, or conveyances of any such property shall be null and void, which shall have been made within sixty days after proclamation. This was the declaration of a forfeiture of estate and property. The joint resolution, which properly is a proviso to the act, limits and restrains the forfeiture of the *real estate*, so that it shall not extend beyond the natural life of the offender. It is not necessary to discuss the question whether this would not have been the determination of the courts even without the proviso. Mr. Lincoln thought so, and he was a clear-minded, strong, intellectual man, with a legal training and healthy cultivation of thought which enabled him to act with almost judicial calmness amid the turbulence by which his administration was surrounded. He was constitutionally called upon to act either to sign or refuse to sign the bill, before it could become an act. This consideration is strongly persuasive to show that the whole confiscation act is to be construed in the light of the principles governing the subject in the country from which we derive our ideas of jurisprudence.

The details of confiscation and forfeiture had long ago been considered in the English courts.

Blackstone, Com., 4, 381, says: "Forfeiture is twofold; of real and personal estate. First, as to real estate: by attainder in high treason a man forfeits to the King all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements, which he had at the time of the offense committed, or at any time afterward, to be *forever* vested in the Crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backward to the time of the treason committed; so as to avoid all intermediate sales and incumbrances, but not those before the fact." It is evident that the Congress, in the enactment of the law of 1862 and the joint resolution, intended to avoid any conflict with the Constitution, and that it was the intent to follow out the great rules of forfeiture as understood in England, modified, limited, and controlled by our constitutional provisions.

It is to be observed, however, that the act of 1862, operating upon the real property of the rebel, is, to some extent, in advance of the laws of England, and must be given force to by the general power which Congress has to prescribe the punishment of treason, or to suppress insurrection. Blackstone, Com., 4, 387, says: "There is a remarkable difference or two between the forfeiture of lands and of goods and of chattels: 1, lands are forfeited upon attainder, and not before; goods and chattels are forfeited by conviction. Because in many of the cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore, in those cases the forfeiture must be upon conviction or not at all; and, being necessarily upon conviction in those, it is so ordered in all cases, for the law loves uniformity."

But this apparent difference is explained when we consider that in England attainder works corruption of blood, and forfeiture extends to heirs. See dissenting opinion of Mr. Justice Miller in *ex parte Garland*, 4 Wallace, 387.

. So far as the civil powers of the Government are concerned, that must depend upon the Constitution, or some act of the Congress under the provisions of the Constitution. And the Congress has enacted the law of 1862, and the court has pronounced that act constitutional.

As we have before said, the courts saw proper to conclude that the act was an exercise of the war powers of the Government, excepting the first four sections.

Those war powers were derived from the Constitution, for among the enumerated powers is, "the Congress shall have power to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections*, and repel invasions."

The act of 1862 declares that it is an act, among other objects, to suppress insurrection, to punish treason and rebellion. Each of which purposes the Congress had the express power to accomplish. One mode of doing this was to seize, condemn, and sell the lands of those engaged in rebellion.

The deceased, Charles S. Wallach, was engaged in the rebellion, owned lands in the District of Columbia, which were seized, condemned, and sold, as provided for in said act; thereby the same became forfeited to the Government of the

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United States, and he, the said Charles, had no more and no longer any control over, or power to dispose of the same, or to grant them, either in fee or for life, or in any other manner.

The land was condemned for the reason that its owner was in rebellion against the Government which protected him in the peaceable possession and enjoyment thereof until, by his treason, he forfeited the right thereto. And by reason of the limitation by the act of Congress, his heirs are entitled to the possession of the same, and the property thereto is in them, subject to the satisfaction of the balance, if any, of the note secured by the deed to Carlisle.

Such are the grounds of my dissent to the judgment announced in this case.

RIVES vs. HICKEY.**EQUITY.—No. 2758.**

Where a deed of conveyance contained a clause giving the privilege of a road through the land of the grantor, but the same had not been executed by laying out the road for a period of more than sixty years, it will become inoperative as against a purchaser of the land, subject to such road, who had no notice of such claim, and where there was no road actually in existence at the time of his purchase.

STATEMENT OF THE CASE.

In the year 1812, one James Clerklee owned a tract of land in the county of Washington, D. C., fronting on the Bladensburg turnpike road, and containing 300 acres.

On the 21st of September of the same year he sold and conveyed to one William Brent about 200 acres of said tract, more or less, and the deed conveying the same to said Brent contains this clause: "And also the privilege of a road from the land hereby conveyed, at least 15 feet wide, through the land of said Clerklee, from the stone quarter erected near the north line of said tract, in the most convenient direction to the turnpike road."

In 1835, Brent sold and conveyed to Hickey, father of defendant, the land conveyed by Clerklee; and Franklin Rives, the plaintiff, in April, 1871, purchased and now owns 40.43 of the land of Clerklee, reserved by him from the conveyance to Brent. At that time plaintiff had no notice that defendant claimed any right of way over said land, and he swears positively there was none then in existence. The defendant has commenced to cut a roadway through plaintiff's land under the covenant in the aforesaid deed from Clerklee to Brent, and the bill is filed to enjoin him from making or using such roadway.

There is no evidence in the case to show that said covenant had ever been executed by the laying out of a road thereunder down to the year 1835, the date of the conveyance to defendant's father; and considerable testimony was

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read upon the hearing as to whether any particular defined roadway through plaintiff's land had been located or used since 1835 to the time of filing the bill. Prior to 1840 defendant's father, through whom this claim is made, obtained two other and more convenient outlets to the turnpike road over land now owned by defendant and his sister.

W. D. Davidge and *R. K. Elliott*, for complainant, cited—

Washburn on Easements, 71–631; *Stoker vs. Singer*, 8 Ellis and B., 31, 39; *Perkins vs. Dunham*, 3 Strobb., 224; *Dyer vs. Sandford*, 9 Met., 395.

J. D. McPherson and *W. M. Shuster*, for defendant, cited—

Ward vs. Ward, 7 Ex., ch. 838; 2 Greenf., Cruise 29; *Farnum vs. Platt*, 8 Pick., 339; *Washburn on Easements*, p. 551; 24 Pick., 106.

By the COURT: The following are in substance the grounds upon which the decree below was affirmed:

1. That by the non-execution of the covenant contained in Clerklee's deed, as quoted above, for a period of more than sixty years, it has become inoperative, and, in this case, cannot be revived and asserted, as against the plaintiff.

2. That the covenant above quoted, did not, of itself, locate the route of the proposed right of way, and that inasmuch as the immediate parties thereto never caused it to be *actually* executed upon the land, it rested merely in treaty, and cannot, at this day, be set up to the prejudice of an innocent purchaser for value without notice.

3. That the assignees of the grantee named in the deed of 1812, having subsequently acquired, over their own land, two roads more convenient to the turnpike, and having used them exclusively as such, and thereby induced the plaintiff and all others to believe that they asserted no claim to any other road, they are concluded in a court of equity from so doing, especially as against the plaintiff, who stands in relation of

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an innocent purchaser of a part of the *servient* estate for value, without notice of any easement thereon.

4. The “*privilege of a road*” given by express grant, may be lost under *such* circumstances as against such *bona-fide* purchaser without *notice*, although mere non-use alone of an existing and defined right of way might not operate to produce that result.

The decree is affirmed.

DAINESE vs. HALE.

AT LAW.—No. 9615.

- I. The treaties between the United States and Turkey, together with the act of Congress of July 22, 1860, authorize our ministers and consuls in Egypt to exercise judicial powers over American citizens in that country, in civil as well as criminal matters.
- II. In actions of tort for injury to goods, it is material to allege in the declaration the number, quantity, and value thereof, as near as may be.

STATEMENT OF THE CASE.

This is an action of tort, and the plaintiff alleges in the declaration that the defendant, on and after September 17, 1864, was consul-general of the United States in and for the country of Egypt; and that in abuse of his power defendant took cognizance of a certain controversy between plaintiff and Richard H. and Anthony B. Allen, citizens of, and residing in, the United States, and that neither plaintiff nor the said Allens were then within the Turkish dominions; and that said defendant did, under a pretended order obtained by himself, seize, take, and distrain the goods, wares, and merchandise of plaintiff, and did issue a pretended process of garnishment, which prevented the collection and settlement of claims, credits, and choses in action belonging to plaintiff, for the space of 1,160 days, whereby said goods and merchandise were greatly damaged and lessened in value, and said credits and rights in action irretrievably lost.

There is also a count for converting the same, and the plaintiff estimates his damage at \$125,000.

The second plea of defendant to this declaration sets up that, as consul-general, by the laws of the United States, he was invested with judicial functions and powers over citizens of the United States in said country of Egypt; and in the exercise of such judicial power he took cognizance of said cause, and that said Dainese having a store of goods then in Egypt, he issued the order of attachment complained of; and

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that for such exercise of judicial functions he is liable to the United States and the laws thereof, and not to the plaintiff.

To this plea the plaintiff demurred on the ground that the defendant had no such powers as those set up in the plea, either by the laws of nations or by the laws of the United States; and that, in committing the grievances complained of, he exceeded his authority and acted maliciously.

The circuit court overruled the demurrer, and from this decision the plaintiff appealed to the general term.

This case requires an examination of the treaties which have been negotiated between the United States and the Ottoman Porte. The first was ratified on the 7th of May, 1830, and the second, which is the one now in force, on the 25th February, 1862. The fourth article of the treaty of 1830 was the only portion particularly discussed at the argument as defining the jurisdiction of American consuls, and reads as follows:

“If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American dragoman be present. Causes in which the sum may exceed 500 piasters shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offense, shall not be molested; and even when they may have committed some offense they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offense, following in this respect the usage observed toward other Franks.” (8 Stat. at Large, 409.)

And the first article of the treaty of 1862 confirms all former rights and privileges conferred on citizens of the United States, and then declares:

“It is, moreover, expressly stipulated that all rights, privileges, or immunities which the Sublime Porte now grants, or may hereafter grant to, or suffer to be enjoyed by, the subjects, ships, commerce, or navigation of any other foreign power, shall be equally granted to, and exercised and enjoyed

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by, the citizens, vessels, commerce, and navigation of the United States of America.” (12 Stat. at Large, 1217.)

The 20th article provides that this treaty shall extend to, and receive execution in, Egypt. These treaties, it will thus be seen, extend to citizens of the United States in Egypt all the rights, privileges, and immunities there granted, or hereafter to be granted, to the citizens of other foreign nations, and this stipulation necessarily involves a consideration of the rights and privileges which Turkey has conceded to the consuls of other Christian powers, resident within her dominions. These rights are defined by treaties, which show that such consuls exercise both civil and criminal jurisdiction over their countrymen to the exclusion of the local tribunals. This difference of the powers of consuls in Christian and Moham-medan countries is now recognized and sanctioned by commentators on the laws of nations. The United States have negotiated treaties with other nations, which, like Turkey, do not profess the Christian religion, viz: China, Persia, Siam, and Japan, all of which provide that American citizens shall be subject to the jurisdiction of the authorities of their own Government, without interference on the part of the native magistrates; and an act of Congress was approved July 22, 1860, (12 Stat. at Large, 72,) which, in express terms, invests ministers and consuls “with all the judicial authority necessary to execute the provisions of such treaties, respectively,

* * * which jurisdiction shall embrace all controversies between citizens of the United States;” and the fourth section provided that such jurisdiction in civil and criminal matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, as far as such laws are suitable, and when these are not adapted to the object, the common law, including equity and admiralty, shall be extended over such citizens, and if these are deficient, the minister shall, by decree and regulation, furnish remedies which shall have the force of law.

The following sections, from five to twenty, inclusive, require ministers to prescribe forms of process to be used by the consuls; the mode of trial; the punishment to be inflicted; make it the duty of consuls to encourage the settlement of controversies by mutual agreement, or by arbitration; regu-

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late fees, &c. Then comes the twenty-first section, which is as follows :

“SECTION 21. That the provisions of this act, so far as the same relate to crimes and offenses committed by citizens of the United States, shall extend to Turkey, under the treaty with the Sublime Porte, of May 7, 1830, and shall be executed in the Ottoman dominions in conformity with the provisions of said treaty, and of this act, by the minister of the United States and the consuls of the United States (appointed) to reside therein, who are hereby *ex officio* vested with the powers herein conferred upon the minister and consuls in China, for the purposes above expressed, so far as regards the punishment of crime, and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usage in its intercourse with the Franks or other foreign Christian nations.” (12 Stat. at Large, 76.)

The construction which our Government places upon our treaties with the Ottoman Porte is thus stated in the Consular Manual, a work published under the auspices of the State Department :

“As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of ‘the usage observed toward other Franks.’ * * * The phrase in the second article engages that citizens of the United States in Turkey shall not be ‘treated in any way contrary to established usages.’ The ‘established usages’ are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.”

This receives illustration from the fact that the ex-territoriality of foreign Christians has given rise to a system of judicial tribunals in heathen and Mohammedan countries, for the trial of controversies both civil and criminal, between citizens of Christian nations under the protection of public law and treaty.

It is believed that the material facts have now been stated upon which the decision of the court was made, and it will be seen that the main question presented was, whether admitting the defendant to have been consul-general and the

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highest diplomatic officer of the United States in Egypt at the time of the committing of the alleged grievances, he was invested with judicial power under the treaties and laws of the United States, and could exercise judicial authority over the property of American citizens in that country.

Henkle & Arrick, with whom was *Mr. F. P. Cuppy*, for plaintiff, claimed—

I. That neither the laws of Turkey nor of this country authorized the defendant to do the things complained of in the declaration.

II. That however this may be since the passage of the amendatory act of 1866, the laws of the United States had conferred no civil jurisdiction whatever upon the defendant when he committed the grievances complained of.

III. That the treaties between the United States and Turkey contain no grant or stipulation authorizing American consuls to exercise civil jurisdiction in Turkey.

IV. That there is no law or usage of Turkey and no law of the United States authorizing American consuls in Turkey to attach the property of persons who are not within their consulate.

V. That whatever power consuls in Turkey may possess to hear causes between American citizens residing there, it is an executive and not a judicial power.

VI. That the process of attachment is an extraordinary remedy, resting exclusively upon statutory enactment, and when resorted to by an executive officer, without authority of law, constitutes a trespass, for which he is liable in an action for damages.

And cited *Hayburn's case*, 2 Dallas, 409. *United States, Appellant, vs. Administrator of Pass*, 13 Howard, 40. *Dainese vs. Allen*, 3 Abbot, 212; 1 Peters, 511.

W. Penn Clarke, for defendant, argued that the demurrer to the plea was properly overruled for two reasons :

I. Because the treaties between the United States and the Turkish Empire, and the laws of the United States, as well

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as the law of nations, confer upon the consul-general of the United States in Egypt judicial powers both civil and criminal, over the persons and property of citizens of the United States in that country.

II. Because the declaration of the plaintiff is bad in substance, and though the plea may be defective, a bad plea is a good answer to a bad declaration; and on demurrer, judgment must be given against the party who committed the first error in pleading.

It is a matter of regret that more space cannot be given to the elaborate briefs of counsel. No written opinion was delivered, but—

CARTER, C. J., pronounced the decision of the court to the effect—

First. That the act of Congress, approved July 22, 1860, entitled "An act to carry into effect provisions of the treaties between the United States, China, Japan, Siam, Persia, and other countries," &c., confers upon the officers therein mentioned judicial powers which they have authority to exercise over citizens of the United States in those countries in matters both civil and criminal.

Second: That the treaties of 1830 and 1862 with Turkey place our Government on a footing with the most favored nations, giving the same rights and privileges to our people in that country that are conceded by the Sublime Porte to the subjects of other Christian states. That among the rights thus secured is that of establishing consular courts, with jurisdiction to hear and determine all classes of cases between American citizens, to the exclusion of the local jurisdiction; and this is now the well-settled and established usage of Turkey and other non-Christian nations in their intercourse with Europe and the United States. That, therefore, the defendant, as the diplomatic representative of this country in Egypt, had jurisdiction of the proceedings stated in the pleadings, and is not responsible except to the Government and laws of the United States.

Third. It is contended that the defendant is not a judicial court, and is not entitled to the protection of a judge of a ju-

dicial court. That the judicial power of the United States is vested by the Constitution in one Supreme Court and such inferior courts as Congress from time to time may ordain and establish; and that the judges thereof shall hold their offices during good behavior, and their salaries shall not be diminished, and that therefore, as a consul or minister is an executive officer, he cannot be vested with judicial power so as to be entitled to the immunities of a judge; but even if consuls and ministers could not be vested with judicial powers under the constitutional provision referred to, still it might be justified under the part of the Constitution for making treaties and appointing ambassadors, ministers, and consuls. That this latter power is general and unrestricted, and leaves Congress at full liberty to make all regulations necessary for the safety and protection of the citizens of the United States in all countries with which we have treaty stipulations. The judicial duties assigned to our ministers and consuls in those countries is, therefore, a legitimate exercise of legislative authority, and as the defendant was empowered thereby to sit as a court, and inasmuch as the acts complained of were done in that capacity, he is not liable in this form of proceeding.

Fourth. That the demurrer to the plea was properly overruled, for the reason that the declaration itself is fatally defective in not stating the quality, quantity, or number or value of the goods, wares and merchandise, or the claims and choses in action, or the names of the parties owing them. This is material in actions for injuries to goods, and as the declaration is the first pleading defective, judgment on the demurrer was properly rendered against plaintiff.

The order overruling the demurrer is affirmed.

JOLLEY vs. PLANT ET AL.

AT LAW.—No. 10,324.

In an action of debt upon a bond, the declaration should state the breach, and that defendants have neglected to pay the sum due, or that the same remains unpaid at the time of bringing suit. This is a necessary allegation.

STATEMENT OF THE CASE.

This was an action on a bond. The declaration describes the bond and alleges a breach of its condition, and then concludes, "Wherefore, the defendants became liable to pay the amount aforesaid," but it does not show that the defendants neglected to pay the same, or that it was still unpaid. The defendants demurred that the declaration was bad in substance, which was overruled by the court below, whereupon the defendants appealed to the general term.

Fred. P. Stanton for plaintiff.

E. L. Stanton and *A. S. Worthington* for defendants.

By the COURT:

The demurrer is well founded, for the reason that the declaration does not show any liability on the part of the defendants at the time of bringing suit. The declaration should not only state the breach complained of, but the non-payment of the amount due upon the specialty. The simplified form prescribed by our common-law rules makes it a necessary allegation that the sum claimed "is still unpaid."

As this essential requisite is wanting, the circuit court erred in overruling the demurrer, and the order appealed from must therefore be reversed.

**ODEN BOWIE vs. THE BALTIMORE AND OHIO
RAILROAD COMPANY.**

AT LAW.—No. 6772.

- I. The delivery of inanimate property on the platform of a railroad company, which is the usual place of receiving freight preparatory to shipment, and under an agreement previously made for the transportation of the same, is a sufficient delivery to charge the railroad company with liability as a common carrier.**
- II. But where the property consists of race-horses, accompanied by the agent of the owner, assisted by other persons in the employment of the owner, three of whom are race-riders for the horses, and who travel with and take care of them, and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading it as he thought best, after having been requested by the railroad employes to place the horse under their control, the owner would not be entitled to recover for an injury to the horse sustained under such circumstances.**
- III. On the trial of an action for such injury, where there is a conflict of testimony as to whether the agents of the road or those of the owner had charge of the horse when the accident occurred, it is erroneous to charge the jury that if the servants or agents of the owner refused obedience to the agents of the road the latter would still be responsible for the injury, and that it is their duty, if they could not control the servants of the owner, to refuse transportation of the horses, in order to escape such responsibility.**

STATEMENT OF THE CASE.

This was an action to recover damages against defendant as a common carrier for an injury to a mare, the property of the plaintiff.

The declaration avers that the defendant received from the plaintiff certain property, to wit, the plaintiff's mare, known by the name of Australia, to be carried from the city of Washington to the city of Baltimore, for reward in that behalf; and that by the negligence, carelessness, and improper conduct of the defendant, the said mare became and was injured, and the plaintiff greatly damaged, &c. The plea was, not guilty.

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The bill of exceptions states that on the trial the plaintiff offered evidence tending to show that a Mr. Hall, a partner of plaintiff, on the 20th of May, 1869, engaged transportation for four horses on defendant's cars from Washington to Baltimore, one of which was the mare Australia, and that on the following morning the horses were sent to defendant's depot to be put on board of the cars in charge of Major Bacon, their trainer, who was accompanied by four boys, three of whom were race-riders, and all of whom were accustomed to travel with and take care of said horses. It also appears from plaintiff's evidence that several fruitless attempts were made to load the mare on the car which had been provided by the railroad for the transportation of the animals, by the agents of the plaintiff, as well as by those of the defendant; and that in this state of things, Bacon, seeing a plank-board on the platform, said to the railroad-men, who still remained on the platform, that if they would place that at the door-way he would attempt to back her over it into the car; the railroad-men then placed this board at the door-way and Bacon attempted to back Australia into the car over it, but she refused to go, and he made no further attempt to put her on the car, and told the railroad-men he would not make any further attempt to put her on board, but would stay with her, and the train could go on with the other horses; thereupon, two men, whom he supposed to be railroad-men, took hold of the mare by the head and commenced to force her back over this board against the remonstrance of Bacon, who still held on to the bridle and tried to prevent them, and, unable to do so, tried to guide the mare, as he saw she was being pushed on one side of the board, and while she was being so forced back, one of her hind legs slipped off the end of the plank down into the space or aperture between the permanent platform and the car, and the board then broke and both hind legs went into the space or aperture; and the two men who had been backing her jumped on her to hold her down until they were made to get off by Bacon, and the mare was extricated very much bruised and cut in her legs.

The train was finally moved to another loading-place where there was a shute, made like a stall, to which, by the direction of defendant's agent, the mare was led by Bacon, and

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she was then loaded on the car without any difficulty. That the said mare broke down in consequence of the said injuries and has ever since been valueless as a racer, and that her market-value before said accident was not less than \$10,000.

The evidence on the part of the defendant tended to show that when Major Bacon and the boys came to the depot in the morning with the horses, one Dennis Blake, an employé of defendant, showed them the car for the horses and placed a movable platform at the door of the car and indicated that the car was ready for the loading. The different attempts to load the mare on the car, by the agents of both parties, are also detailed by the defendant's witnesses, but it is not deemed necessary to state them, as the mare was not injured until a Mr. Koontz, who was in the employ of defendant, said he would go after the engine and have the car moved to another place, and told Blake not to have any further attempt made to load the mare at that place.

The bill of exceptions contains the following statement of defendant's evidence of what took place afterward:

"When Koontz went away, and after he went away, the board was placed where the temporary platform had been, at the suggestion of Bacon, who said he was not going to stay there all day, and if they would put this board at the door he would try to back the mare over it. Blake told him not to try to back the mare over this board, and Bacon said he would take the responsibility of backing her over it; at this time Blake was standing in the door-way of the car to prevent the mare being backed in, when two or three men, outsiders, not in the employ of the defendant, but who had been on the platform during the attempt to load the mare, took hold of her and attempted to force her back over the board, and while they were doing so, one of her hind legs slipped off the end of the board into the space between the car and the platform, and the same men jumped on her to hold her down. When the men commenced to force the mare back, Blake got out of the way, because he says he was afraid of being run over; he did not prevent or attempt to prevent the men from taking hold of the mare and pushing her back over the board, and did not prevent, or try to prevent, the board from being placed at the door of the car, nor did he

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take hold of the mare at all at any time, or try to take or get hold of her; no employé of the defendant had hold of the mare at any time.

“That after the accident the mare was taken to the place where she was finally loaded, at which place she was got on the car—but had to be forced on. No agent of the defendant announced that the car was about to leave, nor was it, in fact, about to start. The plaintiff then offered evidence in rebuttal, contradicting witnesses for defendant, and then rested.”

The record shows several exceptions to instructions given, and also to the refusal to give others, but no further mention of them in this statement is necessary, for the reason that the decision of the case is placed upon other grounds.

The jury having retired sent two communications to the court, which are fully set out in the opinion following, where, upon the judge ordered the jury to be called into court, and, in the presence of counsel for the respective parties, instructed them as follows:

“1. Whether the taking of the mare on to the platform in the yard of defendant, in preparation for loading, constituted a delivery so as to transfer the responsibility from the owner to the company. If you find from the testimony that the plaintiff's servants, under an agreement to transport the property, took it on the premises and on the platform of the defendant, where a car was found prepared, and the property was delivered with the view, and received with the purpose, of shipment, that is a delivery that transferred responsibility from the owner to the carrier; no words of delivery are specially necessary. If you find in the acts of parties revelations of delivery and receipt, you will conclude that delivery and receipt transpired.

“2. Whether, conceding these transactions took place, the interposition of the plaintiff's servants in counteracting the economy of the defendant in the mode of transferring the property to the car would exonerate defendant from its liability and place the risk on the plaintiff; whether acts of plaintiff's servants in custody of the horses in disobeying orders of defendant's agents in the mode of placing property on the cars would defeat the liability so as to make the plaintiff responsible for peril incurred in consequence.

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“For the purpose of ending the question, I will say, if you find from the testimony that delivery transpired from the owner to the defendant, and continued through the process of transferring the horses to the car, if absolute possession of the property was not retrieved, if it was not repossessed and resumed by the owner or servant, the disobedience of owner's servant to defendant would not exonerate defendant. It was then their duty, if they could not control the plaintiff's servants, to refuse to put the horses on the car.”

To which charge or instruction, and every part thereof, defendant, by his counsel, excepted.

The jury in the court below found a verdict in favor of plaintiff for \$10,000, and the defendant moves for a new trial here in the first instance on the bill of exceptions.

Bernard Carter, with whom were *R. T. Merrick* and *A. G. Riddle*, on the point involved in the decision contended that, as to instructions or charge of the court in response to the questions asked by the jury—

The *first* instruction was given in response to the question in which the jury asked the court to tell them whether certain acts, enumerated in the question, constituted and amounted to delivery to, and acceptance by, the defendant, of the horses.

The court, in response to this query, very properly, instead of declaring, as *matter of law*, that any particular act or circumstance, in itself, constituted delivery and acceptance, told the jury that whether there was delivery and acceptance, or not, was a question for the jury to decide, and that in determining this question they must not suppose that *words* were necessary to constitute delivery, but they could find such delivery from the *acts* of the parties, as interpreted by the intention with which these acts were done.

This is an *accurate* and *comprehensive* statement of the law upon the subject. 2 Red. on Railway, pp. 46, 48; 6 Gray, 541, *Fitchburgh Railroad vs. Hanna*; see, also, 40 N. Y., 550, *Gordon vs. Railroad Company*; 1 McCord, 444.

As to the second part of the charge or instruction of the judge to the jury—

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This instruction is, that if the jury find that there was a delivery of the horses by the owner into the possession of defendant, and that they *continued* in the possession of the defendant through all the process of their transfer into the cars, and that possession of them was not resumed by the owner or his servant, then the disobedience of owner's servants to defendant would not exonerate defendant.

The court will notice that the conclusion arrived at by the judge in this part of his charge is stated to rest altogether upon the hypothesis that the jury find, as a preliminary thereto, that possession of the property was not only originally delivered to, and taken by, the defendant, but that this possession thus acquired *continued* throughout all the process of loading the horses; and it is *only* in the event of their finding such to be the case that it is declared that the disobedience of owner's servants to defendant would not exonerate defendant.

The judge thus declared that if the property had been put into the possession and custody of the railroad company, and was, during the whole time, retained by it, then it cannot escape responsibility *merely* by showing 'that thereafter the servants of plaintiff did not obey all *orders*, or *directions*, or *suggestions* of defendant or its agents.

Having assumed charge and responsibility of the horses, and thus become common carriers, it is not *enough*, to exonerate them, to show that servants of owner did not do all they were told to do.

If the possession thus acquired continued all the time, the defendant is responsible, notwithstanding the owner's servants did not obey defendant's orders; because, if defendant, after having assumed possession and custody of the animals, chose to allow owner's servants still to take part in the loading of the horses, defendant made them *pro hac vice* its own *agents*; having once received the animals into his possession, defendant was responsible for all proper management of the same, and is responsible for the acts of all persons it *allows* to take part in this management.

The defendant having assumed possession, had a right to control and subordinate to itself all the agencies of the loading, and was bound to do one of two things, viz: Either,

first, to see that these agencies were all properly conducted, and whether consisting of mechanical appliances or the acts of human beings handling the animals, and to be responsible therefor, and including herein the servants of owner, if defendant allowed them to take part; or, secondly, if defendant found that servants of owner refused to be subordinated and obedient to directions of defendant, then defendant had a right to redeliver the possession to agents of plaintiff, and decline to allow the horses to be loaded on the cars, or to be transported thereon.

The defendant could take *either* alternative, but cannot claim to occupy both positions at one and the same time.

If it retained possession of the horses for the purpose of loading and transporting, it is responsible for the same, whether the manual handling of the animals and arrangement of the appliances was by its own agents, or by those of owner, as the same could not have been in the hands of the *latter* without defendant's allowing it to be so; if defendant did not wish it to be so, and owner's servants declined to yield, defendant had the other alternative, viz, of redelivering the possession of the horses to owner's servants, and so ending all relations of carrier and shipper, and relieving itself of responsibilities.

These principles amply sustain the judge's rulings, and are amply sustained by authorities. See the following: 11 Allen, (Mass.,) 80, *Merritt vs. Old Cal. and N. R. R.*; 32 Pennsylvania, 417; 2 Red. on Rail., 130, (note,) opinion of Woodward, U. J.; 1st McCord, (S. O.,) 444, *Cohen vs. Humes*; 22 Law Journal R., (C. P.,) N. S., 90, *Willoughby vs. Horrage*; 17 Jurist, 323, (same case;) 37 Mississippi, 691, *Powell vs. Mills*; 5 Missouri, 36, *Pomeroy vs. Donaldson*; 16 La. Ann., 222, *Peters vs. N. O. & J. R. R.*; Story on Bailments, 533; 2 Red. on Rail., 48; 2 Daly, (N. Y.,) 471, *Lamb vs. C. & A. R. R.*

Walter S. Cox and *James A. Buchanan*, for defendant, in respect of the answer of the court to the written questions of the jury, contended, in the seventh subdivision of their printed brief, as follows:

7th. And, finally, it is respectfully submitted that the in-

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structions of the court below, in response to the written questions of the jury, (see record, pp. 18, 19, and 20,) did not state the law of the case correctly, and therefore the new trial upon exceptions should be granted. (See Story on Bailments, 486, sec. 532; 2d Redfield on Railways, 46, sec. 156, and 47, sec. 156-4, and cases cited in note 3; 2d Redfield on Railways, 41, sec. 155, and cases cited in note 12; *White vs. Winnisimmet*, 7th Cushing, 155; *Wilson vs. Hamilton*, 4th Ohio State Reports, 722; 2d Redfield on Railways, 48, sec. 156; —, sec. 7, and cases cited in note 7.)

Mr. Justice WYLIE delivered the opinion of the court:

“The liability of common carriers attaches from the time of their acceptance of the goods. But where goods are actually put into the wagon or barge of the carrier, he will not be chargeable if it appears there is no intention to trust him with the custody; as, if the owner is uniformly in the habit of placing his own servant on board as a guard, who exclusively takes upon himself the management and custody of them.” Story on Bailm., § 533, citing *East India Co. vs. Pullem*, 1 Str. R., 590; *Robinson vs. Dunmore*, 2 B. & P., 419; *Shuffelin vs. Harvey*, 6 Johns. R., 170; Marshall on Ins., b. 1, ch. 705, which fully sustain the doctrine laid down by Story.

“A non-delivery will also be excused by any act of the shipper which discharges the carrier from any further responsibility. As if, with the consent of the shipper, he delivers them over to another carrier, or, he deposits them at an intermediate place to await the future orders of the shippers, or, *if the shipper takes them into the exclusive custody of himself or his own servants*. But it will be otherwise if he merely accompanies them in their transit, *not exercising any exclusive custody over them*.” *Ib.*, section 578.

In *White vs. The Winnisimmet Co.*, 7 Cush. R., 154, the facts were these: The plaintiff drove his horse, attached to a loaded wagon, upon a ferry-boat, paying the usual toll, but declined to take the place assigned for the horse and wagon by the agent of the defendants in charge of the boat, and selected his own position, which he occupied without further objection from the agent. He did not give up the custody of the horse

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and wagon to the defendants, nor express any desire to do so, but left the horse, which was not accustomed to ferry-boats, alone, and while thus unattended the horse became frightened, sprang against a chain, across the head of the boat, which was fastened to hooks. The hooks broke and horse and wagon went overboard, and the horse was drowned and wagon injured. The owner brought an action against the company, as owner of the boat, to recover the amount of his losses. But the court decided—

1. That the defect in the hooks was one for which the company was liable, and which, under other circumstances, might have charged it with the losses in this case, but that—

2. The plaintiff not having, himself, exercised ordinary and reasonable care and diligence in the oversight and management of the horse, and the loss being, in all probability, owing to this cause, he could not recover.

In *Smith vs. New Haven and Northampton R. R. Co.*, 12 Allen, 531, it was held by the supreme court of Massachusetts “that common carriers were not responsible for injuries to live stock, caused by the peculiar character and propensities of the animals.”

And in the *Michigan Southern and Indiana R. R. Co. vs. McDonough*, a report of which we find in 5th vol. American Law Review, 178, it was held by the supreme court of Michigan “that upon sound principle, and upon the English authorities, it was clear that the transportation of cattle by railroad does not come within the reasons of the law applicable to common carriers, so far as relates to the care of the property and responsibility for its loss or injury,” and “that as the company did not hold itself out as insurer of live stock, it was not liable to the plaintiff in this action.”

We think these authorities are grounded in right reason, and propose to apply them to the present case.

Plaintiff was owner of four race-horses, for which he had engaged transportation from Washington to Baltimore. These horses were “in charge of Major Bacon, their trainer, who was accompanied and assisted by four boys, three of whom were race-riders for the horses, two of whom were 17 years of age, and all of them accustomed to travel with and take care of the horses.”

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One of these horses, the mare Australia, was injured while being put on board the car, at the Washington depot, so that she became worthless as a race-horse, and this action was brought against the defendant to recover for the loss, alleged to be \$10,000. The jury gave \$8,000.

It seems there was no difficulty in getting the other three horses on the car, but the mare Australia was "wild and high strung" and very difficult to manage.

Major Bacon with his four assistants, aided by several employés of the company, were all engaged in trying to get the mare transferred to the car, when she fell from the gangway down between the platform and the car, and received the injury in question.

There was a conflict of testimony between the witnesses for the plaintiff and those for the defendant, as to the suitability and adequacy of the gangway which had been furnished by the defendant for the occasion, and as to who had the charge and management of the mare when the accident occurred—whether the agents of the plaintiff or those of the defendant.

After the jury had been out for some time they addressed a note to the court in the following terms:

"HON. D. K. CARTER:

"DEAR SIR: The jury in the case of *Bowie vs. The Baltimore and Ohio Railroad Company*, disagree as to the question of the lawful delivery of the mare Australia into the custody of the agents of said road, and we would respectfully ask your honor to instruct us if the taking of the mare into the depot, and putting her on to the platform, was a lawful delivery of the same; and, if so, did the custody and possession remain in the defendants notwithstanding the agent of the plaintiff, or trainer, retained possession of her, and insisted upon loading her as he thought best on the occasion, after having been requested by the agent of the defendant to place her under his control.

"JOHN VAN RISWICK,

"*Foreman.*"

The record does not show whether any notice was taken by the court of this note from the jury until a second one was handed to the court, of which the following is a copy:

“ WASHINGTON, D. C.,
“ February 19, 1873.

“ Hon. JUDGE CARTER :

“ We respectfully request of your honor, that, whereas there exists some obscurity in the minds of some of the jury in the case of *Bowie vs. Baltimore and Ohio Railroad Company*, we be instructed what constitutes in the eye of the law the delivery and acceptance of the mare in question to the agent or agents of said railroad company, viz: Does the fact that said mare of the plaintiff was carried to and on the premises of said railroad company, as had been previously agreed upon, and placed on the platform for transportation from Washington to Baltimore by said company's agents, and when placed on said platform efforts were made by said company's agent or agents to load the car with said mare, constitute said delivery and acceptance by said company.

“ JOHN VAN RISWICK,
“ Foreman.”

In response to these inquiries the chief-justice instructed the jury as follows :

1. Whether the taking of the mare on to the platform in the yard of the defendant in preparation for loading constituted a delivery so as to transfer the responsibility from the owner to the company.

If you find from the testimony that the plaintiff's servants, under an agreement to transport the property, took it on the premises and on the platform of the defendant, where a car was found prepared and the property was delivered with the view, and received with the purpose, of shipment, that is a delivery that transferred responsibility from owner to the carrier; no words of delivery are specially necessary. If you find in the acts of parties revelations of delivery and receipt, you will conclude that delivery and receipt transpired.

2. Whether, conceding those transactions took place, the interposition of plaintiff's servants in counteracting the economy of defendant in the mode of transferring the property to the car would exonerate defendant from its liability and place the risk on the plaintiff; whether acts of plaintiff's servants in custody of the horses in disobeying orders of defendant's

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agents in the mode of placing property on the cars would defeat the liability so as to make the plaintiff responsible for peril incurred in consequence.

For the purpose of ending the question, I will say, if you find from the testimony that delivery transpired from the owner to the defendant and continued through the process of transferring the horses to the car, if absolute possession of the property was not retrieved, if it was not repossessed and resumed by the owner or servant, the disobedience of owner's servants to defendant would not exonerate defendant. It was then their duty if they could not control the plaintiff's servants to refuse to put the horses on the cars.

To which charge or instruction and every part thereof defendant by its counsel excepts.

The error of the first paragraph of this answer consists in telling the jury that a delivery of the mare on the platform preparatory to shipment would itself be sufficient to charge the defendant with liability. In regard to inanimate chattels, that would have been a correct proposition. But that was not what the jury were troubled about. They had asked the court to tell them whether, if such delivery had been made, "did the custody and possession remain in the defendant, notwithstanding the agent of the plaintiff or trainer retained possession of her, and insisted on loading her as he thought best on the occasion, after having been requested by the agent of the defendant to place her under his control." Under the circumstances, as stated in the inquiry put by the jury, we think the court ought to have told the jury in plain terms that the plaintiff was not entitled to recover in this action.

And that the error of this instruction arose not merely from neglect on the part of the court, through inadvertence, to respond to the material portion of the jury's inquiry, is shown from the concluding paragraph of the instruction, where the court tells the jury in substance that, although the management and control of the plaintiff's horse at the time of the accident was claimed and exercised by the plaintiff's own servants and agent, to whose charge it had been specially committed for that purpose, and that these servants and agent refused to follow the advice of the defendant's agents

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in the matter, the defendant was nevertheless responsible for the loss ; and that the only way for the defendant to escape such responsibility would have been to refuse to transport the animal.

That this instruction was erroneous we think is clearly shown by comparing it with the authorities which have been quoted, as well as on principle.

FENWICK ET AL. vs. BRUFF ET AL.

EQUITY.—No. 3040.

- I. A deed of trust containing a mistake in having the word *west* instead of *east*, contrary to the intention of both parties in the beginning of the description of the premises conveyed, will be corrected on a bill in equity filed for that purpose by the grantees, not only as against the grantors, but against the parties to a prior deed of trust upon the same premises of which said grantees had no knowledge or notice, and which was not recorded for over a year subsequent to the record of their conveyance, and the latter so corrected is decreed to be the first incumbrance upon the property.
- II. The doctrine that permanent and fixed boundaries or monuments, palpable to observation, control courses and distances, applied to the facts of the case.

STATEMENT OF THE CASE.

The opinion of the court contains a sufficient statement of the facts in this case.

James G. Payne for complainants :

It is not only the province but the duty of a court of equity to remedy a mistake in a deed, or to reform or correct the deed, not only as against the original parties to the instrument, but against their privies, against assignees, judgment-creditors, purchasers with notice, and all those claiming under the original parties in privity. *Johnston vs. Jones*, 1 Black, 224; *Rhode Island vs. Mass.*, 15 Peters R., 259; *Simmons vs. North*, 3 Smed. & Mar., 67; *Wall vs. Arrington*, 13 Geo., 88; *Strang vs. Beach*, 11 Ohio St. R., 283; Kerr on Fraud and Mistake, p. 410, note, and 420; *Hans vs. Morris*, 63 Pa. St. R., 637; *Burke vs. Anderson*, 50 Geo., 535; *Baskins vs. Calhoun*, 44 Ala., 582; Adams's Equity, 169, note; *Whitehead vs. Brown*, 18 Ala., 682; *Davis vs. Rogers*, 33 Me., 222; *Tilton vs. Tilton*, 9 New Hamp. R., 385.

The description in the deed from Bruff and wife to plaintiff sufficiently identifies the land sought to be conveyed, and distinguishes it from all other land.

As a notice it contains the requisite information to bind subsequent purchasers as well as creditors. Even if the description were uncertain or ambiguous, such purchasers and creditors were put upon inquiry as to its intention and effect. *Le Neve vs. Le Neve*, 2 Lead. Cas. in Equity, 179; *Banks vs. Ammon*, 3 Casey, 172; *Murdy vs. Vawter*, 3 Grattan, 518; *Jackson vs. Post*, 15 Wendell, 594; *Lockett vs. White*, 10 Gill & J., 480; *Price et al. vs. McDonald*, 1 Md., 419; *Godfrey vs. Beardsley*, 2 McLean, 412.

R. T. Morsell for defendant:

It is a general principle, in courts of equity, that where both parties claim by an equitable title, the one who is prior in point of time is deemed the better in right; and that where the equities are equal in point of merit, the law prevails. *Boone vs. Chiles*, 10 Peters, 209.

When a question arises as between two persons claiming as purchasers for valuable consideration, and there is nothing to give one a superiority over the other, the title of the defendant to protection is as good as that of the plaintiff to relief; and the former is without the jurisdiction of a court of equity, even if the latter has brought himself within it. But this equality of right will be varied in favor of the one who has succeeded in obtaining the legal estate. 1 Term Rep., 763, c.

White vs. Carpenter, 2 Paige, 249; 2 Leading Cases in Equity, 169, 170; *French vs. The Loyal Co.*, 5 Leigh, 627; *Lodge vs. Simonton*, 2 Penn. Rep., 439; *Bell vs. Twilight*, 2 Foster, 500; *Mills vs. Smith*, 8 Wallace, 33.

2 Leading Cases in Equity, 53; 24 Pickering, 276.

Willoughby et al. vs. Willoughby et al., 1 Term Rep., 763; Story's Equity, §§ 411, 412.

Mr. Justice OLIN delivered the opinion of the court:

A bill in equity was filed in this case—

1st. For the purpose of reforming an alleged misdescription in a deed of trust, executed on the 1st of July, 1871, by Richard W. Bruff and wife to William A. Fenwick and William

Fenwick et al. vs. Bruff et al.

T. Walker, trustees for the South Washington Building Association, purporting to convey a tract of ground in this city known and described as being part of lot numbered thirty-nine (39) of Samuel Lee's subdivision of a former subdivision of original lot numbered six in square 873.

The second ground of relief asked for in the bill was the process of injunction restraining White and Semmes, trustees of the National Union Building Association, from selling the property alleged to have been conveyed to Fenwick and Walker. The deed to White and Semmes was executed on the 1st of April, 1870, and was, as appears by the answer of defendant, so executed by Bruff and wife to secure an outstanding indebtedness of Bruff to the National Union Building Association. The deed to the complainants was placed upon record on the 2d of August, 1871, and on the 29th of October, 1872, the National Union Building Association placed upon record its deed of the date of April 1, 1870. This latter deed correctly describes the premises alleged to have been intended to be conveyed to the complainants. The description of the premises supposed to have been conveyed to the complainants is substantially as follows, to wit: A parcel of ground in said city known and described as being part of lot numbered thirty-nine (39) of Samuel Lee's subdivision of a former subdivision of original lot numbered six in the same square, 873. Beginning for the same at the southwest corner of said original lot six, and running thence northwestwardly along said avenue (Pennsylvania avenue) eighteen (18) feet; thence northeastwardly at right angles to said avenue eighty-four feet four and a quarter inches; thence due west to an alley ten feet wide; thence along said alley ten feet ten and a quarter inches; thence parallel with said avenue about twenty-eight (28) feet to the northwest of original lot five, (5,) and thence by and with the east line of original lot six (6) to the place of beginning.

It will be readily seen by a diagram or plat of this ground, such as accompanied the complainant's brief, that the only mistake in the deed from Bruff and wife to the complainants was the word west for east. Substitute the word east for west and the description of the premises is not only certain to a common intent, but is mathematically certain. If the

word west be adhered to, not only every course and distance must be disregarded, but at least half a dozen well-defined measurements and notorious landmarks must be disregarded—such as Pennsylvania avenue; lot No. 39 in Lee's subdivision, the northwest corner of original lot 5, a line part of lot No. 6. Those permanent and fixed boundaries or monuments, as they are called, palpable to the observation of all men, have been held to control courses and distances.

The defendants in their answer admit or at least do not deny that the deed executed by Bruff and wife to the complainants was intended to convey precisely that tract of land which would have been conveyed had the description of the premises been perfectly accurate. I do not see well how the defendants could have interposed any other answer.

The justice holding the special term or equity court very properly decreed that the mistake in this deed should be reformed as prayed in the bill. No prudent or careful man, we think, could fail to observe that the deed to Fenwick and Walker was intended to convey that part of lot 39 which was previously conveyed to White and Semmes.

The justice holding the equity court, however, decreed allowing the correction of the deed prayed for in the bill of complaint *as between the original parties* to that instrument, but not to affect the rights of the defendants to this suit under their deed of trust of April 1, 1870, and dissolving the injunction which had been previously granted staying the sale of the premises under and by virtue of the power contained in the deed of trust to White and Semmes. From the latter part of this decree the complainants appealed to this court.

The legal effect of the latter part of this decree is to postpone the rights of Fenwick and Walker, or more properly staying the South Washington Building Association under their deed of trust and making their deed subordinate to and a second incumbrance upon the property mentioned in the two deeds. From this part of this decree an appeal is taken to this court.

It is averred in the bill, and admitted in the answer, that the complainants at the time of advancing their money upon the faith of the security of this lot had no knowledge or

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notice of the existence of the deed to Semmes and White, of April 1, 1870. They were thus *bona-fide* purchasers for a valuable consideration without notice.

It is alleged, in the defendant's answer, that defendant's deed of April 1, 1870, was withheld from record by collusion between Bruff and Johnson, both officers of the National Union Building Association; Bruff being a director and Johnson the secretary of the latter company.

It is refreshing to find the truth told in the pleadings in a suit.

This deed to Semmes and White was withheld from record to enable Bruff to borrow money upon the security of this property as free from incumbrance.

Here is precisely that fraud which the act of Congress, in reference to the recording of deeds and other conveyances affecting real estate, was wisely designed to prevent, and which act that part of the decree appealed from renders nugatory and of no effect.

The part of the decree appealed from should be reversed, and the decree so modified as to make the first deed to Fenwick and Walker the first incumbrance upon this property.

Mr. Justice WYLIE dissenting.

LEACH ET AL. vs. LEWIS.

AT LAW.—No. 8616.

L. accepted a bill of exchange for the accommodation of T. H. & C., with the understanding that they would raise money on it with which to pay their indebtedness to plaintiff. They also agreed to take care of the acceptance, and plaintiffs were so informed, but, failing to raise money on it, transferred it to plaintiff in payment of such indebtedness, and also in consideration of further advances and forbearance.

HELD—

- I. That this was not a misappropriation of the acceptance.
- II. That such transfer was for value, and in the usual course of business.
- III. That plaintiffs were entitled to recover against such accommodation acceptor.

STATEMENT OF CASE.

Suit brought on the following bill of exchange by the indorsees and holders against the acceptor :

“\$500.00.]

NEW YORK, 18th Nov., 1870.

Sixty days after date, pay to the order of ourselves five hundred dollars, value received, and charge the same to account of

TILDEN, HALL & CO.

To J. O. LEWIS, Esq.,

No. —, Washington, D. C.”

“Accepted ; payable at the Ocean National Bank, New York.

J. C. LEWIS.”

The case was referred, by consent of counsel, to Walter S. Cox, esq., who made an award in favor of the plaintiffs, to which defendant took exceptions, and the motion for judgment on the award together with the exceptions were certified to the general term, to be heard in the first instance. From the testimony reported by the referee the following facts may

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be deduced. A letter was addressed by a member of the firm of Tilden, Hall & Co., who are the drawers of the bill and whose place of business is in the city of New York, to J. C. Lewis, of the city of Washington, and who is the acceptor and the defendant in this action. The letter is as follows :

“NEW YORK, *November 5, 1870.*

DEAR SIR: We want to raise some money for a few days, which we can do if you will be kind enough to accept a draft on you, making it payable in New York. We owe our glass-factor, and can raise enough money on this draft, which we need to deposit as security. This accommodation is only needed for a few days, until we can make our collections, when we will take it up and return to you. I know this is asking a great favor of you, and if it was not so certain that our collections would be made in time for us to protect it, I would not ask it.

Yours,

J. T. H. HALL,
For Tilden, Hall & Co.”

“J. C. LEWIS.”

With this letter they forwarded the draft to Washington, which was accepted by Lewis solely for their accommodation, upon an agreement that it was to be deposited as security with a friend of said drawers, who was to loan them money thereon to enable them to pay their indebtedness then due the plaintiffs. Tilden, Hall & Co. were at that time indebted to the plaintiffs in about \$400. They tried to raise the money by discounting or depositing the bill of exchange, but the parties upon whom they relied disappointed them, and they then proposed to the plaintiffs to receive it as security for the amount then due, and also in consideration that they would make additional advances of goods to said Tilden, Hall & Co., to make up the balance of the draft. The plaintiffs, after taking time to consider the proposition, took the bill, made the advances, and extended time of payment.

The defendant also claims that he has shown by the testimony, the plaintiffs knew at the time they received the acceptance that it had been accepted by defendant without consideration, and that Tilden, Hall & Co. had agreed to

take care of it, and that the plaintiffs promised said Tilden, Hall & Co. to look to them and not to the defendant for payment.

Upon this state of facts the defendant contended that the acceptance was accommodation-paper; that plaintiffs knew it to be so when they received it, and that it was passed to them as security for an antecedent debt, out of the usual course of business, and that therefore they stood in no better position than the drawers.

Lloyd & Fraser for plaintiffs :

It is no defense to this action that the acceptance was passed to plaintiffs as collateral security for existing and future indebtedness. The pre-existing debt, the act of forbearance, and the delivery of additional goods to the drawers constitute, or either of these facts constitute, a sufficient consideration, but more especially do they constitute a sufficient consideration taken together. The plaintiffs, therefore, acquired the acceptance in good faith, for value, in the usual course of business, and free from equities existing between the original parties. *Pond et al. vs. Lockwood et al.*, 8 Ala., 669; *Payne vs. Bensley*, 8 Cal., 260; *Robinson vs. Smith et al.*, 14 Cal., 94; *Bostwick vs. Dodge*, 1 Doug. (Mich.), 413; *Carlisle vs. Wishart*, 11 Ohio, 172; 1 Zabriskie, 665; *Swift vs. Tyson*, 16 Pet., 1; *Goodman vs. Simmonds*, 20 How., 343; *Vallette vs. Mason et al.*, 1 Ind., 89.

H. T. Wiswall for defendant:

The defendant proved that this acceptance was delivered by him to the drawer solely upon the faith of the drawer's promise to use the draft only as security for a loan, and take up and return to defendant. He also proved that the plaintiff knew the whole history of the bill; that at the time of transfer the drawer reminded plaintiff that this was only accommodation-paper given to drawer upon his agreement with defendant to use only as security for a loan, and take up and return to defendant, and plaintiff then made an express agreement with drawer that he would look only to the drawer for payment and would not present it at bank, would keep it in his safe, and would not call on defendant for payment. *Daggett vs. Whiting*, 35 Conn., 366.

CARTTER, Ch. J., at the conclusion of the argument, announced the decision to the following effect:

We are of opinion that judgment should be entered on the award. It is clear from the testimony that Lewis accepted the draft for the accommodation of Tilden, Hall & Co., and for the special purpose of enabling them to raise money to pay their indebtedness to the plaintiffs. It is also evident that they tried to negotiate the draft, but the parties they relied on could not let them have the money, and then they induced the plaintiffs to receive it for the four hundred dollars they owed them, and for the further consideration of advances up to its full amount. This can scarcely be called a misappropriation of the acceptance. It was given for the express purpose of enabling Tilden, Hall & Co. to procure the means of paying their existing indebtedness to these plaintiffs. It was in fact applied to that purpose by being transferred directly to them instead of to somebody else. The precise object for which it was given was thus fairly accomplished. The court can see no ground of defense in this.

It is quite likely that the drawers agreed to take up the acceptance at maturity, and that the plaintiffs were informed of this agreement when they received the transfer. But this is only in accordance with the usual understanding between parties to accommodation-paper, for when a person indorses for another without consideration, it is upon the express or implied agreement that the person accommodated will save him harmless, but this cannot affect his liability when the paper has been applied to the purpose for which it was made, and the fact that the drawers have failed to meet their engagements in this respect cannot release the defendant under the circumstances of a case like this. It is argued that plaintiffs agreed to look to the drawers, but we think this fact is not established by the evidence.

Besides, it clearly appears from the testimony that the plaintiffs agreed to furnish additional goods in consideration of the transfer. It was therefore a negotiation for value and in the usual course of business.

We are of opinion that there should be judgment on the award.

KIRK vs. ZELL ET AL.

IN EQUITY.—No. 2706.

- I. K. purchased land of S. and gave instructions to a scrivener to prepare a deed that should convey one portion of the premises to him upon certain trusts, and the remainder in fee-simple. By a mistake of the scrivener the whole of the premises was conveyed upon trusts. HELD, that the deed should be reformed in order to give effect to the intentions of the parties.
- II. The deed was executed in 1856 and the bill filed in 1872; but K. did not discover the mistake till 1861, and was absent from the city till 1865. He had control of the premises, made improvements, paid taxes, and carried on business there ever since. No adverse interest had been acquired, and no one injured or misled, and the mistake being clearly established, the court under these circumstances excused the *laches* in bringing suit and granted the relief asked for.

STATEMENT OF THE CASE.

The bill is filed to reform a deed of trust from one Hugh D. Sweeney to the plaintiff. It sets forth that the complainant purchased the land fronting 106 feet on Seventh street, in the city of Washington, from said Sweeney in the year 1851, and at once entered into possession of the premises, but the deed was not executed until December 20, 1856. That he gave instructions to one Thomas Donn, then a justice of the peace, to prepare an instrument conveying all the property to the plaintiff in his own right, except 25 feet front, purchased by Mrs. Zell, who is the plaintiff's sister, and which was to be conveyed to the complainant in trust for said Mrs. Zell during her life, and at her death in trust for her children.

That said Donn by mistake so draughted the instrument that all of said property was conveyed to plaintiff in trust, contrary to the intention of all parties thereto, and was executed in this form by said Sweeney without examination; that complainant has continued in possession of said land, except the 25 feet intended to be conveyed to him in trust as aforesaid, either by himself in person, or by his tenants to the present time. That he has paid the taxes and made valuable improvements thereon, and that said mistake was not discovered by him until recently. The bill concludes with a prayer

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for reformation of the deed, so as to give effect to the intention of the parties.

There was a decree *pro confesso* as to all the defendants except E. F. Zell, husband of Mrs. Zell, who in a separate answer admits the purchase by the complainant, but he alleges that he requested him to purchase a piece of land for himself, but he did not inquire how much land was purchased, and did not see the deed until five years after it had been recorded, and that he rested under the same, and made improvements. Denies that it was the understanding that only 25 feet were to be conveyed in trust, and he urges the staleness of complainant's demand. That he has no personal knowledge of instructions to Donn, and does not know when complainant discovered the mistake.

No testimony was taken in support of the answer, and Kirk states in his deposition that he employed Donn to prepare the deed from Sweeney, and sustains by his own oath, and that of others, all the allegations in the bill in respect to the mistake in the deed, and as to his having been in possession and control of the property, and paying taxes and making improvements thereon.

With regard to laches of the complainant in filing his bill, his testimony shows that he possessed and controlled the property without any claim being set up by the defendants. That the mistake was not discovered until 1861, and that he left the city at that time and did not return until 1865, and that during his absence his brother-in-law, the said Zell, attended to his business as general agent; and that both Zell and his wife knew of the improvements, and admitted Kirk's individual right to the whole of the remaining 78 feet as his own separate property.

At the hearing in the court below, the bill was dismissed, and the cause is here upon an appeal from that decree.

R. Ross Perry, for complainant, cited the following authorities to illustrate the doctrine of courts of equity in relation to laches: 2 Story's Eq. Juris., § 1520 and note; *Hillary vs. Waller*, 12 Vessey, jr., 365; *Prevost vs. Gratz*, 6 Wheaton, 481; *Elmendorf vs. Taylor*, 10 Wheaton, 168; *McKnight vs. Taylor*, 1 Howard, 161.

John E. Norris for defendants.

Mr. Justice MACARTHUR delivered the opinion of the court:

From the evidence in the cause we think it is quite clear that there was a mistake in the deed from Sweeney to the plaintiff. We are perfectly satisfied that the agreement was to convey only 25 feet fronting on Seventh street in trust for Mrs. Zell and her children, and that the remainder of the premises was to be conveyed to Kirk in his own right. By the mistake the defendants would acquire a beneficial interest in four times as much land as they were entitled to according to the understanding and agreement of the parties. The jurisdiction of a court of equity to grant relief on account of mistake of facts, and to reform contracts in accordance with the intent of the parties, is an established principle, and we think the complainant has a right to our interposition unless he is deprived by the lapse of time of this title to relief. We are all of opinion that he is not barred of his remedy, in view of the facts of this cause, by reason of the length of time that has elapsed since the execution of the deed. The mistake is clearly made out and was not discovered till 1861, and from that period the defendant was absent from the city till 1865. During his absence Zell had charge of his business and rendered accounts thereof, including the property in question, on his return. There is nothing like adverse possession presented upon the proofs, nor of improvements having been made by Zell on his own account, except on the 25 feet about which there is no dispute. Mere lapse of time is undoubtedly an equitable defense, but where the delay is accounted for the court will excuse it. There is the most complete proof in the cause that no adverse interest has been acquired; that the party asking relief has been constantly in possession of the property or of the rents and profits thereof, and that no one has been injured or misled by his *laches*. We are, therefore, of opinion that the decision appealed from must be reversed and a decree made for the reformation of the deed as prayed for in the bill.

WASHINGTON AND GEORGETOWN RAILROAD
COMPANY vs. BOARD OF PUBLIC WORKS.BOARD OF PUBLIC WORKS vs. WASHINGTON
AND GEORGETOWN RAILROAD COMPANY.

IN EQUITY.

A party may demand a rehearing as a matter of right where four justices decide the question in any cause and the court is equally divided in opinion. And where the fifth judge takes no part in the decision on account of being interested in the question, the right of the party is the same.

STATEMENT OF THE CASE.

This was a motion to vacate an order allowing a re-argument of the appeals in the above-entitled actions. The decrees in the court below were affirmed at the last general term by a divided court. They were heard by the five justices, but when the decision was announced one of the number declined to participate in the judgment on the ground that he was interested in the question decided. The re-argument was granted under the 3d section of the act relating to this court, approved July 21, 1870, 16 Stat., 161, which reads as follows :

“ Whenever, at a session of the court in general term, held by *four of the justices*, the court shall be equally divided in opinion upon a question involved in any cause argued or submitted to the court, such division of opinion shall be noted on the minutes of the court; and thereupon, and in four days thereafter, either party in such cause may file with the clerk of the court a motion in writing to have such cause re-argued before the *five justices*; and such re-argument and rehearing *shall be had* as soon thereafter as conveniently may be.”

J. H. Bradley, jr., and *S. Phillips*, for the railroad company, contended that—

The objection now made to a rehearing is, that the statute does not provide for the condition of the present cases.

They were heard by the *five* judges constituting the court. Judge Wylie, one of the number, *excused* himself in making

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up the judgment of the court, on the ground of his having an interest in the question decided. If the cases were ordered to be re-argued, the same disqualification would exclude his participation in the second judgment.

As the statute provides for a re-argument "before the five justices," it is self-evident it has no application when the court cannot be composed of that number. Its object was to give a party on a division when the case was heard by four the right to have the case reheard when the fifth judge was present, but when the fifth judge is a party in interest this becomes impossible, for he cannot be legally present, and the statute does not legally apply to the case.

The only object, then, that a re-argument under this condition could in any event accomplish would be a change of opinion among the four judges, but this is not within the intention of the statutory provision.

We submit, therefore, that the finality of the judgment of affirmance heretofore rendered should remain undisturbed by the action of this court, and that the only revision the party is entitled to is by the Supreme Court of the United States.

William A. Cook contra.

By the COURT :

This motion presents the point whether a re-argument can be granted under the statute in a cause where the four justices who decided it were equally divided in opinion, and the fifth justice, who was also present at the hearing, declined to take part in the decision of the court on account of being interested in the question. There is no exception in the law, and there is nothing left to the discretion of the court. The party may demand as a matter of right a re-argument in any cause where a division of opinion is noted in the minutes of the case. The incompetency of the fifth justice may be removed by a change of interest before the cause is heard again, and in that event it can be re-argued before all the justices, and the statute would then properly apply to the case. Besides, it is certainly within the discretionary power of the court to grant a rehearing in any case when it seems desirable. We think the order sought to be vacated was properly entered.

Motion denied.

**JOHN C. HARKNESS, GEORGE H. PLANT, ET ALS.
vs. THE DISTRICT OF COLUMBIA, AND HENRY
D. COOKE, ALEXANDER R. SHEPHERD, JAMES
A. MAGRUDER, SAMUEL P. BROWN, AND A. B.
MULLETT, MEMBERS OF THE BOARD OF PUBLIC
WORKS OF SAID DISTRICT.**

IN EQUITY. No. 2924.

- I. It is now a well-settled principle that courts of equity will not interfere by injunction to restrain the enforcement or collection of a tax, upon a mere allegation that the tax is illegal or void. This principle proceeds on the ground that the party asking relief has an adequate remedy at law.
- II. The chancery jurisdiction will only interpose when the enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury, or where it would throw a cloud upon the title to real estate.
- III. But where an assessment is void upon the record of the proceedings in making it, there can be no cloud upon title within the equity powers of this court, and it is only when the invalidity is to be proved outside of the record, that chancery will interpose its preventive remedies.
- IV. The principle of law that a purchaser at a tax-sale must prove the regularity of the proceedings from the beginning to the time of the sale, and that all the requirements of the statute have been complied with, has not been changed by the act of the legislative assembly in regard to the effect of a tax-deed.
- V. Individual tax-payers whose property has been separately assessed have not that community of interest which will allow them to unite in a bill of complaint to restrain the collection of taxes alleged to be illegally assessed, on the ground of preventing a multiplicity of suits.
- VI. A court of equity will not interfere by injunction when the consequences which might ensue would be little less injurious than those to be prevented by this process.

STATEMENT OF THE CASE.

The justice holding the special term in equity passed a rule for the defendants to show cause why they should not be restrained from proceeding to collect certain assessments

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upon the property of the complainants, for the cost of improvements upon New York avenue; and the application has been certified to the general term, to be heard in the first instance. The complainants are nine in number, and represent in their bill that they are all owners in severalty of lots of ground fronting upon New York avenue, between Ninth street west and Fifteenth street west, in the city of Washington, and that numerous other persons to them unknown are also owners in like manner of lots fronting upon said avenue, on behalf of all of whom, as well as of themselves, they bring this suit. The bill also alleges that all the defendants, except the District of Columbia, are members of the board of public works of said District; and that on the 30th day of August, 1872, and subsequently thereto, they caused to be served upon each of the complainants a written notice in substance and to the effect following, viz: That his ground fronting upon New York avenue, between the streets aforesaid, has been assessed for special improvements at the rate of \$10.24 $\frac{69}{100}$ per front foot, for "carriageway and footway," and that if any person so notified as aforesaid shall neglect or refuse to pay the amount so assessed against his or her property as aforesaid after the expiration of thirty days, (from the service of said notice,) the said board of public works will immediately thereafter issue certificates of indebtedness against the property so assessed, which certificates shall bear interest until paid at the rate of ten per cent. per annum; and until paid, the assessment and certificate shall remain, and be, a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year the said board shall, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the certificate and assessment exists, or so much thereof as may be necessary to pay said assessment: *Provided*, That the owner of said real estate shall have the right to redeem the property so sold, by paying the amount of the purchase-money, and twenty per centum (per annum) thereon, within two years from the date of sale.

The power of the board of public works with regard to assessments is conferred by the 37th section of the act of Congress approved February 21, 1871, entitled "An act to

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provide a government for the District of Columbia," which provides that "there shall be in the District of Columbia a board of public works, to consist of the governor, who shall be president of said board; four persons to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, &c. They shall hold their office for the term of four years. The board of public works shall have entire control of, and make all regulations which they shall deem necessary for keeping in repair, the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress. They shall disburse, upon their warrant, all moneys appropriated by the United States for the District of Columbia, or collected from property-holders in pursuance of law, for the improvement of streets, avenues, alleys, sewers, roads, and bridges; and shall assess, in such manner as shall be prescribed by law, upon the property adjoining, and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected."

On the 10th of August, 1871, the legislative assembly of the District passed an act prescribing the mode of assessments for special improvements, and providing for the collection of the same. The 3d section of that act is as follows:

"That if any person or persons, notified as aforesaid, shall neglect or refuse to pay the amount assessed against his or their property, as aforesaid, after the expiration of thirty days, the said board of public works shall immediately thereafter issue certificates of indebtedness against the property assessed, as aforesaid, which certificates shall bear interest until paid at the rate of ten per centum per annum; and until paid, the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year, the said board shall, upon the application of the holder of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exists, or so much thereof as may be necessary to

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pay said assessment, such sales to be first duly advertised daily, for three successive weeks, in the regular issue of some newspaper published in the District of Columbia, and to be made by said board at public auction to the highest bidder; and a deed shall be given by the governor, countersigned by the secretary of the District of Columbia, which deed shall be deemed and held to be a good and perfect title to any property bought at any such sale hereby authorized: *Provided*, That the owner of such real estate shall have the right to redeem the property so sold, by paying the amount of the purchase-money and twenty per centum (per annum) thereon within two years from the date of sale."

The bill then avers several matters affecting the regularity and validity of said assessment, to wit: That the contracts made by said board of public works were at a cost of more than double the amount appropriated for the improvement of said avenue; that such contracts were not authorized by law, and that the board had no lawful power to assess any portion of such cost on the private property of the complainants, and of others adjoining thereto; and that the cost of improvements in street-crossings and in front of church property and Government reservations have been illegally assessed upon their lots, although the same are properly chargeable to the general fund, and other items of expense are charged in the same illegal manner; that said assessments have been made upon said lots by the front foot and not by the value of the property fronting on said improvement, to the great detriment of the complainants. There are several other matters set up in the bill, but enough has been stated to indicate the nature of the objections upon which complainants rely for relief.

The 13th and 14th paragraphs of the bill are given in full:

"And your orators believe and charge that certificates of indebtedness have already been prepared by said board and will be issued at the expiration of thirty days from the service of the notices aforesaid; that said certificates are on their face negotiable, being payable to order, and that it is the design of the said board to negotiate the same and to collect the proceeds thereof; and they are advised, and charge, that the said board being invested by said act of Congress

with general power to make assessments, and by said act of the legislative assembly with general power to issue certificates of indebtedness, and the said assessments and certificates being apparently valid on their face, as your orators aver they are, the said certificates issued under color of law will operate to throw a cloud upon the titles of your orators; and that the said board undertaking by said certificates to bind the property of your orators in the amounts of said assessments, and the issue of said certificates being made a lien upon said property by the aforesaid act approved August 10, 1871, as your orators aver they are, and said undertaking having been notified to your orators, the equities of your orators would be impaired if they failed to resist the pretensions of said board, and, apparently indifferent to or acquiescing in said pretensions, allowed said certificates to issue and pass into the hands of innocent holders. And your orators pray that said board of public works may file with this court a copy of the certificates intended to be issued.

“14th. And your orators further show that they are advised that, being the owners of property fronting on New York avenue, between said Ninth and Fifteenth streets, they have a common interest, although their estates are separate, in resisting the pretensions of the board to make said assessment and issue said certificates; and are entitled to unite in a bill of peace whereby said pretensions may be determined, and a multiplicity of suits and costly and vexatious litigation prevented.”

The prayer of the bill is, that the said assessments may be decreed to be without authority of law and void, and that the said board of public works may be enjoined and prohibited from proceeding to collect the said assessments, and from issuing certificates of indebtedness under or in pursuance thereof; and that if the said property be, in the judgment of the court, chargeable with any portion of the amounts charged in said assessments, then that said portion may be ascertained in such manner as to the court shall appear right, and that upon payment thereof the said property may be decreed to be discharged from any further claim on account of said assessment.

The board of public works interposed an answer denying

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the material allegations of the bill. Two demurrers were also filed, one by the board to particular portions of the bill, and the other by H. D. Cooke to the equity of the bill ; but it will be unnecessary to state them any further, as the motion was decided with reference to the jurisdiction of the court upon the case made by the bill itself.

J. J. Coombs, W. S. Cox, Appleby & Edmonston, and W. D. Davidge, for complainants.

Samuel Philips, S. R. Bond, A. G. Riddle, Enoch Totten, and N. Wilson for defendants :

Mr. Justice MACARTHUR delivered the opinion of the court :

This is an order to show cause why a preliminary injunction should not be allowed prohibiting the board of public works from issuing certificates of indebtedness against the several lots of ground belonging to the complainants and others, fronting and abutting upon New York avenue, between Ninth and Fifteenth streets, in this city.

By the act of the legislative assembly, approved August 10, 1871, it is provided that whenever any improvements shall be completed, a statement of the cost thereof shall be made by the board and filed in their office, and an assessment based upon such statement shall be made and collected by said board in the same manner as other taxes are authorized to be collected ; that if such assessment shall not be paid at the expiration of thirty days after notice, the board is authorized to issue interest-bearing certificates of indebtedness against the property assessed as aforesaid, which assessment and certificate shall be a lien upon said property.

The complainants set forth that they are the owners in severalty of lots of ground fronting and abutting upon New York avenue, between Ninth and Fifteenth streets west, and that other persons are also owners in like manner of lots upon said avenue, between said streets, on behalf of whom, as well as of themselves, this suit is brought. The complainant also shows that an assessment has been made by the board of

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public works upon the several lots so owned by the plaintiff, based upon a statement of the cost of improving said avenue between the streets aforesaid; that plaintiffs have not paid said assessment, and that certificates of indebtedness have been prepared by the board and will be issued, and that it is the design of said board to negotiate the same and collect the proceeds thereof, and they say they are advised that the assessments and certificates being apparently valid upon their face, will operate to throw a cloud upon the titles of the plaintiffs.

There are several allegations respecting the illegality of the assessment, the most prominent being that there was no law authorizing the improvement as it was made, and no valid law authorizing the assessment by the board. The final prayer of the bill is for a decree setting aside such assessment; but the present application is for a preliminary injunction to restrain the threatened action of the board as to issuing the certificates of indebtedness against the lots.

It is now a well-settled principle that courts of equity will not interfere by injunction to restrain the enforcement or collection of a tax upon a mere allegation that it is illegal or void. This rule, as applicable to taxation, is now so familiar and well-established as not to need the citation of authority, and it proceeds upon the ground that in all such cases the party injured has an adequate remedy at law. If the tax be unauthorized, or if the persons making the assessment proceed without authority of law, then most certainly there is an adequate remedy without the interposition of a court of equity. This doctrine is fully expounded by the Supreme Court in the case of *Ewing vs. The City of Saint Louis*, 5 Wallace, 412, where the syllabus reads as follows:

“With the proceedings and determinations of inferior boards or tribunals of special jurisdiction courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by intrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of *certiorari*. Therefore, to a bill filed to enjoin

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the enforcement of judgments rendered against the complainant by the mayor of Saint Louis for the amount of alleged benefit to his property from the opening of a street in that city, and setting forth as grounds of relief want of authority in the mayor, and various defects and irregularities in the proceedings, a demurrer on the ground that a court of equity had no jurisdiction of the matter, and that the complainant had a plain, adequate, and complete remedy at law, was sustained."

Nor do I understand the counsel on either side to controvert the general principle. In the much-cited case of *Dow vs. The City of Chicago*, 11 Wallace, 108, the Supreme Court again sustain and apply the same rule, but stating more clearly the equitable considerations which would justify an apparent departure from it. They say:

"Assuming the tax to be illegal and void, we do not think any ground is presented by the bill, justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. * * * It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances it will be found, upon examination, that the question of jurisdiction was not raised, or was waived."

The limitations of the rule which excludes the action of a court of equity in all cases of tax proceedings are here sufficiently explained. According to which, the chancery jurisdiction will only interpose when the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the plaintiffs. It is argued that the bill in-

this case falls under two of these heads of equity, viz, that it prevents multiplicity of suits and also a threatened cloud upon the title to real estate. Probably the averments of the bill in this respect would be sufficient to lay a foundation for equitable relief if they can be actually applied to the circumstances of this case.

The decisions which establish the doctrine that a court of equity will not enjoin the collection of taxes erroneously assessed, where the injured party can have adequate redress at law, generally declare that a void tax is no tax, and therefore constitutes neither a lien nor a cloud upon the title to real estate. For example, in the case of *Hayward vs. City of Buffalo*, 14 N. Y., 537, the court of appeals say, "It is true that such an assessment and tax is a lien upon real estate, and as such has preference over prior mortgages and payments. * * * This, of course, means a legal assessment. But an assessment made by a board or body having no power to make it is a nullity and no lien upon property. It is claimed, however, that such an assessment is an apparent lien, and should be removed as a cloud, for the reason that it is invalid. But the power of municipal and other inferior officers or bodies to make assessments is in the law, and is as apparent as the act of assessment, and if the assessment is without authority it is not even an apparent lien. If, however, such an assessment is to be regarded as an apparent lien, it does not follow that it is a cloud within the cognizance of a court of equity."

In that case the assessment was for the expenses of the purchase of a lot and the building of a school-house thereon, which were assessed by the board of assessors upon the taxable property of the District, and, therefore, directly covers the question of a cloud upon title to real estate. This is the decision referred to by the Supreme Court of the United States in the case of *Dow vs. City of Chicago*, as stating correctly the grounds of equity jurisdiction. Indeed, the doctrine derived from a review of the various authorities is, that a cloud upon title growing out of proceedings for the collection of taxes can only exist in such rare instances as where the irregularity complained of does not appear upon the face of the record, and where it can only be established by outside testi-

mony. In *Ward vs. Dewey*, 16 N. Y., 519, the court remarked, "When the claim appears valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title." We think this is the settled doctrine of the cases, and in accordance with it we hold that where an assessment is void upon the record there can be no cloud upon title within the equity powers of this court; and that it is only when the invalidity is to be proved by other means that chancery will interpose its preventive remedies.

In the case now before us, all the material facts are matters of record or matters of public law. Whether there was any law authorizing the improvement, or any valid law authorizing the assessment, are matters of record and are as public as the assessment itself. They would all come up upon a writ of *certiorari*. No extrinsic evidence would be required, and in fact none was needed on the argument of this motion.

I am aware that the bill contains the following allegation: "And they are advised and charge that the said board being invested by said act of Congress with general power to make assessments, and by said act of the legislative assembly with general power to issue certificates of indebtedness, and the said certificates and assessments being apparently valid upon their face, as your orators aver they are, the said certificates issued under color of law will operate to throw a cloud upon the title of your orators." But these averments cannot enlarge the operation of the statute which confers a special power upon the board to issue certificates of indebtedness to defray the expense of special improvements only, nor can they alter the legal effect of an assessment not authorized by law, or confer jurisdiction on a court of chancery by a mere admission in order to remove a cloud upon title which can have no existence.

We are also asked to restrain an attempt to issue these certificates, for the reason that if the property upon which the assessment is made be sold for the non-payment thereof, as provided for in said act of assembly, the deed would be conclusive evidence of title. The language of the act in this re-

spect is as follows: "Which deed shall be deemed and held to be a good and perfect title to any property bought at any sale hereby authorized." It is contended that a tax-deed under this provision would be conclusive that all the requirements of the law had been complied with, and that in such case the complainants have no other remedy. Even if the deed had this effect, the complainants would have the right of certiorari, and of recovering back the amount of their assessment, if paid under protest. It has been repeatedly decided that the tax-payer is entitled to both of these remedies at law. But we are not inclined to adopt this construction of the statute. It is a familiar principle of law that a purchaser at a tax-sale must prove the regularity of the proceedings from the beginning to the time of the sale. He must prove that all the requirements of the law have been complied with; and we are inclined to the opinion that the assembly only meant to declare the title perfect when the proceedings had been in accordance with the statute. In many of the States a tax-deed has been made presumptive evidence of regularity, thus changing the burden of proof from the claimant under such a deed to the owner of the land; but I am not aware that it has been made conclusive evidence of all the facts necessary in assessing or taxing lands anywhere. And certainly we ought to require clearer language than that employed in this statute to work a change so radical. Upon the whole we are of opinion that, upon the showing of the bill, we cannot interpose upon the ground of a threatened cloud upon title.

The jurisdiction of this court is also invoked on the ground of multiplicity of suits. There is undoubtedly such a ground of equitable relief, although it is somewhat difficult in application. One rule respecting it is, however, quite clear; and that is, that it cannot be applied where the cause of action is perfect in each individual tax-payer. The reason for a suit being brought in the name of one or more in behalf of all is that where a large number of persons have a common interest in the subject-matter of litigation, a court of equity will administer relief, so as to prevent multiplied and useless litigation. Mr. Justice Story, in his Equity Pleadings, at sections 541, 542, 543, cites several instances of this kind. But if an

action to restrain proceedings for raising taxes can be maintained at all, then the cause of action is distinct and perfect in each separate lot-owner, and there is not the slightest danger of his being harassed by numerous suits, for his rights can be amply settled in one suit alone. This point has been the subject of express adjudication. In the case of *Dodd vs. City of Hartford*, 25 Conn., 232, a bill was filed in chancery by several tax-payers, in behalf of themselves and others, to restrain the collection of a tax for the construction of a sewer, on the ground that said tax was illegal and void. The court say :

“The claim most pressed by the petitioners is, that the court ought to entertain jurisdiction in order to prevent multiplicity of suits. But no one of these petitioners has any interest in the suit which another of them may be called to institute; they cannot individually complain that others are compelled to sue, for they have no share in the expense or vexation of each other's suits. The multiplicity of suits which the petition seeks to avoid does not affect injuriously any one of the petitioners. No one of them has occasion to expect any such multiplicity affecting himself; one suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties, severally, from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidation rule by means of the extraordinary powers of a court of chancery.”

In *Sheldon et als. vs. Center School District*, 25 Conn., 228, a bill in chancery was filed by thirty-nine tax-payers, asking an injunction against the collection of a tax, and the same question was decided in the same way.

The reports of the supreme court of Wisconsin contain two recent cases in which it is held that separate lot-owners cannot unite in an action to restrain the collection of taxes alleged to be illegally assessed upon lots owned by them in severalty, as each is entitled to his own suit. *Barnes et al. vs. The City of Beloit*, 19 Wis., 93; *Newcomb vs. Horton et al.*, 18 Wis., 566.

The case of *Cutting et al. vs. Gilbert et al.*, 5 Blatchford, 259, has recently been frequently referred to in this court until it is familiar to us all. It was a bill in equity filed by

six firms of the city of New York, who were licensed and doing business as bankers and brokers under the internal-revenue act. One of the questions was whether they could unite in a bill of peace to enjoin the assessing and collecting of a tax with which they claimed they were not chargeable, according to the provisions of that act. Mr. Justice Nelson, who decided it, reasons at large upon this aspect of the case, and finally closes that part of it by observing, "To allow them to be made parties to the suit would confound the established order of judicial proceedings, and lead to endless perplexity and confusion. I am satisfied, therefore, that this bill cannot be sustained on account of the joinder of improper plaintiffs."

In the case of *Dow vs. City of Chicago*, already mentioned, although the Supreme Court say that equity will interfere to prevent multiplicity of suits, yet, speaking of the plaintiff in that case, they declare, "Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." It appears to me that these authorities and the reasons on which they are founded show conclusively that individual tax-payers whose property has been separately assessed have not that community of interest which will allow them to unite in a bill of complaint on the ground of preventing a multiplicity of suits, however illegal the assessment may be. But each must stand upon his own right and maintain his action according to the principles of the common law in his own name. It therefore becomes unnecessary to examine the decided cases that are supposed to be analogous, for they have no application to these lot-owners.

A court of equity will not interfere by injunction where the consequences which might ensue would be little less injurious than those to be prevented by this process.

It rests in the sound discretion of the court, and it will grant injunction with the greatest reluctance to restrain a man in the exercise of his trade, or to stay the operations of manufacturing establishments or other private institutions of large business relations. In the leading cases where the attempt has been made to enjoin taxing-officers, the courts have declared that there are reasons of public justice and policy

Harkness et al. vs. Board of Public Works.

why a court of chancery should not interfere to suspend the collection of public revenue, unless in exceptional cases. These declarations have nearly all been made in cases of special assessments, and are founded upon the necessity of a speedy collection of the taxes as the means of carrying on government. These considerations have deterred courts of equity from subjecting the collection of the public revenue to the hazard and delay of protracted chancery litigation; to say the very least, there would certainly be greater danger in allowing injunctions under such circumstances than in refusing them, especially when the lot-owner has adequate remedy at law.

I have not considered this case with reference to the demurrer or answers, but simply upon the showing of the bill. Doubtless, the views already expressed would be decisive of the former. This is not a hearing, however, which can be followed by a judgment final. The order to be made is interlocutory. Nor have I examined the alleged legality or illegality of the assessment. But finding we have not jurisdiction of the action, the order to show cause must be dissolved and the injunction asked for denied.

Mr. Justice WYLIE stated his opinion to be that—

There was an improper joinder of plaintiffs, and for that reason concurred in the judgment of the court; but he was also of opinion that upon the facts set forth in the bill of complaint it could be maintained by a separate lot-owner in his own name.

Mr. Justice OLIN did not sit in the case.

REPORT OF CASES

DECIDED BY

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, AT SEPTEMBER GENERAL TERM, 1873.

PATRICK HOGAN AND OTHERS vs. ELIZABETH KURTZ.

AT LAW.—No. 7156.

- I. Where a widow remains in occupation of the family residence for a period of forty years after the death of her husband, under a claim of ownership, an adverse possession arises which will bar an action of ejectment by the heirs of the husband.
- II. The knowledge of the heirs of the exclusive character in which she holds, may be presumed from such continuous possession when combined with other circumstances.
- III. An ejectment instituted thirty years before the present action by the ancestor and grantors of the present plaintiffs, which was resisted and defeated by the widow, is a sufficient proof that the heirs of the husband knew she was not holding the premises in subordination to their rights.

STATEMENT OF THE CASE.

This was an action for the recovery of real property consisting of part of lot 17, in square 377, in the city of Washington. Thady Hogan purchased these premises from the United States in the month of February, 1803, and occupied the same as a family residence until the time of his death in 1828 or 1829. He never had any children, and had no kindred except some nephews and nieces who were natives of and resided in Ireland. His widow continued to occupy the premises until her death, which happened in October, 1869. In the year 1832 she married James Moore, who died in 1848, during which period she rented the house and lot, and on his death returned to and continued to pos-

sess them until her decease, in 1869, as already mentioned. By her last will she devised said property to her sister, the defendant in this action, who has ever since such death used and controlled it as her own.

The plaintiffs, in order to establish their title, proved that Thomas Hogan, one of the nephews of said Thady Hogan, emigrated to the United States in 1847, and afterward became a naturalized citizen thereof, and his death took place in August, 1861, and the plaintiffs are his children and sole heirs at law. The other nephews and nieces of said Thady Hogan have conveyed their respective interests to the plaintiffs.

In 1842, an action of 'ejectment in the common-law form was commenced, in which the father and grantors of the plaintiffs were the real parties prosecuting, and the said widow and her then husband, James Moore, resisted and defeated the same.

The record contains twelve bills of exceptions to the admission of testimony, and to the instructions of the court to the jury; but it will be seen by the opinion that the case was disposed of upon the single point whether the possession of the widow was adverse to the rights of the plaintiffs. It is, therefore, deemed unnecessary further to mention the exceptions in this statement.

Enoch Totten for plaintiffs.

Geo. F. Appleby for defendant.

Mr. Justice MACARTHUR delivered the opinion of the court:

The only question upon which we think the decision of this case must turn is, whether Mrs. Moore at the time of her death had been in possession of the disputed premises, claiming to own the same in her own right for such a length of time as would bar the right of the plaintiffs. In this inquiry we are of opinion that whether her first husband, Thady Hogan, had ever been naturalized is a matter of no consequence.

Her possession was not affected by that consideration, and as a citizen by birth she was capable of acquiring an interest in the premises by any of the methods known to our laws. It appears that she had been in the possession of this property for a period of forty years from the death of her first husband to the time of her own, claiming to own it, and renting and using it under a claim that she owned it. Ordinarily these circumstances would afford, as a matter of law, a presumption in favor of a title acquired by adverse possession. To rebut this presumption it is argued that her possession was in subordination to the title of the heirs of her former husband, Thady Hogan, and in privity with them, and that before she could change this into an adverse possession it was necessary that she should bring home to them an open and explicit disclaimer of holding for them, and an assertion of title in herself. This is a statement of the law which prevents a tenant in common, or other person standing in a fiduciary relation to the property, from taking possession for himself alone, without explicit notice to the other parties whose interests may be affected by this exclusive assertion of right. And yet it is equally well established that adverse possession commences, and the statute begins to run, from the time such possession becomes open, continued, and notorious. The law will infer from such evidence, even, that the legal owner has been informed of the nature of the possession, and if he does not seek to enforce his remedy within the time fixed by the statute, he is barred. So also a notice of disclaimer may be inferred from the extended lapse of time, combined with other circumstances, against heirs and co-tenants. (*Zetler vs. Eckert*, 4 How., 295.) Now, what are the facts here? Mrs. Moore occupied and controlled the premises for a period of forty years under a claim of ownership. That the character of her possession was understood is fully established by the fact that as far back as 1842 a common-law action of ejectment was instituted for these identical premises, in which the father and the grantors of the plaintiffs were described as the lessors of the fictitious plaintiff therein, and which was resisted and defeated by the widow and her then husband, James Moore. The present action is brought after the lapse of thirty years from the commencement of the former litigation, and whether

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binding or not upon the present parties, as a final adjudication, those under whom they claim were certainly informed that she disavowed holding in any subordinate character or fiduciary relation to them. Whether the possession of the widow was originally subordinate to the title of the heirs, it is clearly evident that they had then notice that she held adversely to them, and for herself alone. The statute was then, if not sooner, put in motion, and has never ceased to run since. We are satisfied that the court below was right in saying to the jury that if they believed this evidence they must find for the defendant.

Judgment affirmed.

CHARLES W. HARMON vs. HORACE S. JOHNSTON
AND JOHN R. McCONNELL.

IN EQUITY.—No. 2482.

It is sufficient to set aside a deed or contract on account of drunkenness if the party executing it be incapable of understanding its terms and conditions. It is not necessary to prove an entire loss of reason, or that the party was entirely demented by drink, in order to avoid it, but the act will be rendered void if the party was in such a condition of mind that he could not comprehend what were the terms and conditions of the instrument.

STATEMENT OF THE CASE.

This was an issue sent down by the justice holding the equity term to be tried by a jury at the circuit. The bill in the equity cause was filed to enjoin the sale of certain property belonging to the complainant therein, under a deed of trust which he had executed to the defendant McConnell, to secure the payment of two certain promissory notes, dated February 3, 1871, made by Z. Whittemore & Kiernan to the other defendant, Johnston. The property consisted of two houses and the land on which they stand. Among the grounds on which the injunction is asked by complainant, one reads as follows :

“5. That on the day, and before the time of executing the deed, and for several days prior thereto, he had been using intoxicating liquors to excess; that he was not addicted to their use; that he is informed by his friends, and verily believes, he was intoxicated at the time of signing said deed; and that the defendants, knowing such to be his condition, took advantage of it to persuade him to sign said deed.”

And in an amended and supplemental bill the complainant alleges that—

“When he executed the said deed and notes, he was so drunk that he did not know what he was doing, and did not know that he was making his said property liable for the payment of said notes, or that he was incurring any obligation to pay them.”

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The defendant answered, and the issue to be tried by the jury is stated by the court in the following language:

“Whether or not the plaintiff was, at the time of the execution of the deed of trust and notes mentioned in the bill of complaint in this cause, capable of executing a valid deed or contract.”

At the trial, the plaintiff offered evidence tending to prove that before, at, and after the time of making said deed and notes, he, the said plaintiff, was in the habit of using intoxicating liquors to excess, and was more or less under the influence of such stimulants all the time. That at the date of said deed he had been drinking freely, and several witnesses testified that they did not consider him fit to do business. Kiernan and Whittemore, the makers of the said notes, secured by the deed of trust, and one other witness, testify that they were present at the making of the deed, &c., and that Harmon was very drunk—so drunk that they did not consider him fit to transact business, or capable of executing a deed or contract.

Dr. Riley testified that Harmon was suffering under a disease called alcoholism, a disease of the brain and nerve centers, and was in such a condition that he would not make a contract with him, and that he was not competent to contract at the time of making the deed, and that he saw him almost daily, about that time, and that he was then laboring under alcoholism.

On cross-examination he stated that he observed this disease in September following the execution of the deed, and said that he did not make a contract with Harmon because on account of the effects of his intemperance he did not want him to do his work. Other witnesses testified to the end that the plaintiff was not in condition to do business, and to the effect that he was very drunk on the day of the execution of the deed and for some time prior thereto.

And the plaintiff rested.

The defendant offered the evidence of McConnell, who drew the deed and notes, tending to prove that Harmon came to his office with Johnston, Kiernan, and Whittemore, to have the deed prepared; that he, the witness, said that he must have Harmon's deed to obtain the description of the property;

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that Harmon said he had not taken it out of the recorder's office, and that Johnston suggested to him at the time that they go to the record-office and get the deed, and that they went and came back with the deed. That he prepared the deed, read it once to Harmon at his request, and explained it to him, and he expressed himself satisfied with it, and he signed the deed, whereupon the deed and notes were given to Johnston.

The same witness and Mr. McNamee, who received Harmon's acknowledgment of the deed, both testified that in their opinion Harmon was sober when they saw him sign and acknowledge the said deed, and that they would not have permitted him to make or acknowledge any paper if they had thought he was drunk.

Evidence was also given tending to prove that Harmon said nothing of the deed being invalid because of his drunkenness till some time after the property was sold, and also that about six weeks after the deed was executed he signed a paper, which was put in evidence, agreeing to the assignment of the lease for which the notes secured by the deed of trust were given.

It was also proved that McConnell and Johnston were entire strangers up to the date of this transaction.

And the defendant rested.

The second and third instructions which the defendant prayed the court to give to the jury are all that is material to an understanding of the case, and are as follows:

"2. To set aside a deed or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of his reason and understanding.

"3. The jury must find for the defendants, unless they believe that the plaintiff was in such a state of intoxication as not to know what he was doing when he signed the deed in controversy."

The court held that if the word "utterly," in the 2d prayer, intended to express an entire loss of reason in all respects, that it was not good law; but if it meant that the defendant must be incapable of understanding the terms and conditions

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of the deed of trust, in order to avoid it, then it was good law, and so modified it was given to the jury.

The 3d and 4th prayers were granted, subject to the following modification: that it was not sufficient to make the deed a valid one for the defendant to know that he was signing a deed of trust on his own property, but he must have been in such a condition of mind as to be able to know and understand the terms and conditions of said deed. It is not necessary, in order to render the deed of the defendant invalid, that, at the time of its execution and acknowledgment, he was entirely demented by drink, but his act will be rendered void if he was in such a condition of mind that he could not comprehend what were the terms and conditions of the instrument.

The defendant excepted to these modifications. The justice holding the equity term on the hearing of these exceptions overruled them, and the defendant appealed to the general term.

Riddle & Miller for appellant:

The court erred in refusing the instructions asked for by the defendant. The second instruction is the exact language of Judge Story. (1 Story's Eq. Jur., § 231.) And this opinion is sustained by all the authorities, *without exception*, so far as a somewhat extended research has discovered them. (3 *Piere Williams*, 131, *Osmond vs. Fitzroy*, Note A; *Jeremy's Eq. Jurisdiction*, 392; *Willard's Eq. Jurisprudence*, 200-1, 196; 1 *Maddox's Chancery*, 300-1-2; *Story on Contracts*, § 44-6; 6 *Harris & Johnson*, 443, *Watkins vs. Stockett*; *Wilson vs. Watts*, 9 Md., 439 and 457; 1 *Bibb's R.*, 406, *Campbell vs. Ketchum*; *Ray's Medical Jurisprudence of Insanity*, § 529.)

M. Thompson for appellee Harmon:

The deed of trust is a contract consisting of "terms and conditions;" and if, from "*alcoholism*" or any other cause, Harmon had not sufficient mind to understand these terms and conditions, then he was not capable of executing a valid deed or contract.

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He might have had sense enough to drive a jack-plane or a cart, or even to make a will, and yet not be capable of understanding the terms and conditions of this deed of trust. (1 Pars. on Contracts, 387; 1 Red. on Wills, 128, 129, 130, 131; 12 Law Register, August, 1873, page 531.)

By the COURT:

A majority of the judges are of opinion that there was no error in the instructions given by the court to the jury.

Judgment affirmed.

Mr. Justice MACARTHUR dissenting.

N. G. STARKWEATHER vs. M. H. PRINCE.

AT LAW.—No. 8936.

- I. Where a span of horses and other chattels are conveyed, upon an agreement that the owner may repurchase the same within six months, upon paying the amount advanced, with two and a half per cent. per month for the use thereof: HELD, that the contract is usurious upon its face, and the agreement valid only for the actual sum advanced.
- II. Where it was also agreed that the owner should have the reasonable use of the property, and pay the expenses of keeping the same, and he tendered the sum advanced within six months, but the pledgee had disposed of the property to a third party: HELD, that the owner may maintain trover for their conversion. HELD, also, that if the latter had been deprived of the reasonable use of the property, the expenses of keeping it could not be recovered from him.

STATEMENT OF THE CASE.

This was an action in trover for a pair of horses, a buggy, harness, &c., tried before the chief-justice at the last January term of the circuit court.

The plaintiff introduced in evidence the following written paper:

“WASHINGTON, *March* 20, 1871.

“Know all men by these presents that I, M. H. Prince, of the city of Washington, D. C., have this day bought of N. G. Starkweather one reversible buggy, one set double harness, shaft and pole, one set single harness, two gents' and one lady's saddle, and bridle, carriage and stable blankets, two whips, mat, and two lap-robcs, one horse named Peacock and one mare named Rhoda, for four hundred dollars, and I agree to hold the above-named property for the space of six months from the above date for N. G. Starkweather, giving him the right at any time within the above-stated six months to repurchase the above-named property, he paying me at the rate of two and one-half per cent. per month for the use of said four hundred dollars, and also granting him the reasonable use of above-named property; and during the term of the six months specified, he, the above-named N. G. Starkweather, is

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to pay the livery and shoeing of horses, or, if I pay the same, the amount so paid to be repaid to me in addition to the four hundred dollars within mentioned; and I also agree, if any damage should occur to the within-named property through any carelessness on my part, to have the same repaired at my cost and expense, or if any damage should occur to said property while in my use to pay expense of such damage as may occur; and in the event of said N. G. Starkweather not being able to repurchase the within-mentioned property in the time herein mentioned then the said property to be sold to the best advantage, and any amount over and in excess of the amount due me to be paid over to said N. G. Starkweather or order; and it is further agreed that none other than myself shall drive the within-named horses, Peacock and Rhoda.

“M. H. PRINCE.

“Witness: JACOB WOLFE.”

And further offered evidence tending to prove that said defendant was placed in possession of said property under said agreement, and shortly thereafter refused to grant him the reasonable use of said property, and that he had not abused his right to have such reasonable use of said team. That just within the said period of six months he tendered to the defendant the sum of four hundred dollars and demanded the return of said property, which defendant refused to make.

He further offered evidence tending to prove that the value of the property mentioned in said paper-writing was from \$1,500 to \$2,000, and that defendant used the team badly, permitted other persons than himself to drive them, and impaired their value.

The defendant offered evidence tending to prove that at the time of the execution of said paper-writing he was a licensed pawnbroker in the city of Washington, D. C.; that he prohibited said plaintiff from using said team, because he was abusing his right to do so to such an extent as to diminish his security; that said plaintiff never tendered said sum of \$400; that he had paid several hundred dollars for the cost of keeping said team; and that after the expira-

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six months he sold said property to the best he could, and did not realize enough to re-imburse 0 and the expenses of keeping said team; and stated.

iff then prayed the court to instruct the jury as

jury shall find from the evidence that the plaintiff unreasonably use the property, and that the plaintiff took exclusive possession of the same and defendant of the use thereof, the defendant should be allowed to recover anything for the keeping of said

jury find from the evidence, under the instruction as to the construction or legal effect of the agreement between the parties, whereby the defendant claims a right in the property in question, the plaintiff tendered the full amount the defendant demanded from him under the circumstances as developed by the evidence, then the plaintiff is entitled to recover."

whereby the court granted, and to the granting of which the defendant excepted.

Plaintiff thereupon prayed the court to instruct the jury as follows:

That the jury believe from the evidence that Starkweather abusing his right to have the reasonable use of the property, when Prince was justified in preventing him from using the same; and the plaintiff is not entitled to recover, unless the jury may believe from the evidence that the plaintiff tendered him the sum of \$400: [provided the jury find the misuse endangered the security of the property.]

That the jury believe from the evidence that Starkweather not abusing his right to have the reasonable use of the property, the plaintiff is not entitled to recover in this case, although the jury may believe that he made a demand of \$400 within said six months, [unless the jury find under the circumstances that the sum demanded does not cover the amount due the defendant.]

That the plaintiff is entitled to recover in this case.

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action, he should, within said six months, have tendered the plaintiff the amount due him, including expenses; not having done so, he is not entitled to recover, [without the jury shall further find that the defendant, in contravention of the agreement, took exclusive possession of the property, depriving the plaintiff of the use of it; in that case the act of the defendant exonerated the plaintiff from paying the expenses of the keep of the horses.”]

Which the court refused to grant, except with the qualifications thereto appearing in brackets; to which refusal to grant each of said prayers as prayed, the defendant then and there excepted, and excepted to the qualification of each of the same, and also to each of said prayers as granted with the qualification.

L. G. Hine for the plaintiff.

W. F. Mattingly contra.

CARTTER, C. J., delivered the opinion of the court, to the effect following :

We think this action was properly brought in trover. The contract in effect is that the property was to be returned to the plaintiff upon his paying the \$400 with interest and expenses of livery within a period of six months. If a tender was made within that time of all that was due the defendant, and he refused to redeliver the property, or had disposed of it by sale to other parties, this undoubtedly amounted to a conversion. By the latter act he was unable to comply with his express agreement to return it. (*Sargeant vs. Blunt*, 16 John., 73.)

Under our present law the contract on its face was usurious, and valid only for the amount lent without any interest. (16 Stat. at Large, p. 91.) The jury have found that the whole amount due defendant was tendered within the six months; which entitled the plaintiff to the possession of the property, and to maintain an action for its recovery.

The court instructed the jury that if they should find from the evidence that the plaintiff had not unreasonably used the

UNITED STATES vs. CHARLES CROSS.

CRIMINAL DOCKET.—No. 8709.

- I. The act of Congress of January 17, 1870, confers original jurisdiction of the offense of petit larceny on the police court of the District of Columbia.
- II. When the last act is read with the 4th section of the act of February 22, 1867, it is little short of an express declaration of an intention to make petit larceny a simple misdemeanor.
- III. Congress has power to reduce a pre-existing felony to the proportion of a misdemeanor, where the penalty is not fixed by the Constitution, and though Congress cannot dispense with indictment in the process of punishment if the offense is infamous, it is equally clear that it has the power to reduce a crime from the grade of infamous to misdemeanor when the Constitution is silent as to the punishment and the infamy.
- IV. To make a penalty infamous, it must pronounce against the offender a degradation from his civil rights, and in the absence of such forfeiture the crime is not legally infamous unless it is so expressly pronounced.
- V. The offense of petit larceny, at the date of the passage of the acts referred to, was not an infamous offense in contemplation of the Constitution, and might therefore be punished without indictment, and was within the jurisdiction of the police court.

The case is stated in the opinion of the court.

The District Attorney for the United States.

A. B. Williams for the defendant.

CARTTER, C. J., delivered the opinion of the court:

This case is certified here by the justice holding the June term of the criminal court. The record shows the criminal indicted by the grand jury for the offense of stealing a United States Treasury note of the denomination of one dollar, and of the value of one dollar; also one national-currency note

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of the denomination of one dollar, and of the value of one dollar. To the indictment, upon being arraigned, the defendant pleads specially that this court ought not to take cognizance of the offense, for want of jurisdiction, inasmuch as Congress, by the act creating the police court of the District of Columbia, approved January 17, 1870, vested in that court the original and exclusive jurisdiction of the offense. Upon this plea the Government takes issue, and out of this issue springs the single question, Has the criminal court any longer original jurisdiction of the offense of petit larceny?

The act creating the police court provides, among other things, that the court by it created shall have original and exclusive jurisdiction of all offenses against the United States, committed in the District of Columbia—that is to say, all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary.

The first section reads as follows:

“That there shall be established in the District of Columbia a court to be called the police court of the District of Columbia, which shall have original and exclusive jurisdiction of all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against any of the ordinances of the city of Washington,” &c.

If there be nothing essential in the offense of petit larceny to distinguish it from other petit offenses, or misdemeanors not punishable by imprisonment in the penitentiary, the language of the act is conclusive of the question, as it does in express terms vest the original and exclusive jurisdiction in the police court over all offenses not infamous, and not punishable by imprisonment in the penitentiary.

The fourth section of the act of Congress, providing for the punishment of certain crimes in the District of Columbia, approved February 22, 1867, enacts “that, if any person shall steal any money or other goods and chattels of any kind whatever of less value than thirty-five dollars, the property of another, or shall steal or maliciously destroy any bank-bill, promissory note, bill of exchange, order, warrant, draft, check,

United States vs. Cross.

or bond, or any accountable receipt for money, given for the payment or acknowledgment of any sum under thirty-five dollars, or any United States Treasury note or Government stamps of less value than thirty-five dollars, the property of another, * * every such person so offending, on conviction thereof, shall make restitution to the party injured in twofold the value of the property stolen or destroyed, and be fined in any sum not exceeding two hundred dollars, or shall be imprisoned in the jail of said District for any time not exceeding six months, or both, at the discretion of the court.

This act, it will be observed, fixes the punishment for the offense, making the punishment fall below imprisonment in the penitentiary; and, as far as punishment can classify the offense, associates it with misdemeanors. In the very act punishing the offense it is made companion of malicious mischief in the destruction of another man's property, an offense always regarded as a misdemeanor. From the two acts before us, read in the light of each other—the one creating a tribunal for the punishment of all offenses where the penalty falls short of the penitentiary, and the other establishing a penalty terminating this side of the penitentiary—we have the judgment of the law-maker, falling little short of express declaration, that the offense under consideration is made a simple misdemeanor. If the law-maker did so intend, and the intention is reasonably expressed, the consideration of the subject might end here.

The power of Congress to reduce a pre-existing felony to the proportion of a misdemeanor exists unquestioned in all cases where the penalty is not fixed by the Constitution.

It is, nevertheless, urged, under the authority of the fifth amendment of the Constitution, that Congress has not the power to dispense with indictment in the process of punishment in this offense, if the offense was infamous. This proposition involves a confusion of ideas. Congress clearly has not the power to dispense with a grand jury in the punishment of crimes made infamous. It is equally clear that they have the power to reduce a crime from the grade of infamy to misdemeanor in all cases where the Constitution does not prescribe the punishment, and pronounce the infamy. It is this, and this only, that they have done. These views of the sub-

several States; adopting the wall of the penitentiary as the wall between the offenders made infamous and the offenders left to be tolerated by the law outside of the penitentiary.

Another mode which we inherit from the civil law is that which embraces offenses entitled "*crimen in falsi*," a class of crimes implying a pervading rottenness of character.

The offense we have before us is embraced in neither of these classes. It is not declared infamous by the law-maker, or necessarily infamous in its nature.

A review of the history of this offense, and its punishments, discloses the fact that at an early period it was made felony at common law, and even when the Parliament of Great Britain separated it from grand larceny, by mitigating its punishment, it was made to maintain its felonious character by perpetuating the forfeiture of the offender's goods, the only badge of felony left in its punishments.

With the disappearance of such forfeiture disappeared the distinctive feature of this offense as a felony. That peculiar penalty passed away with the sovereignty of Great Britain over the colonies, and is in no sense applicable to the definition of the offense within this jurisdiction, inasmuch as the law-maker has not seen fit to make it so.

To hold the doctrine that a crime once made infamous must continue to be so regarded by the law, would be to adopt the unalterable condition of the law as the rule of interpretation—a conclusion at war with the enlightened progress of civil government.

If there is one rule more manifest than another, it is the mitigation of punishment for public offenses, advancing with the march of Christianity and moral refinement from the point where all offenses were indiscriminately punished with death to the mildest penalty consistent with the protection of the public and the reformation of the offender.

The infamy of an offense under the law, which rests in legislative authority, as expressed in the penalty of the law, *may* change, and necessarily *does* change, the penalty of the law. To make that penalty infamous, it must pronounce against the offender a degradation from his civil rights as a citizen, the right of franchise, the right of giving testimony, or some other civil or political right existing in the privileges

FIRST NATIONAL BANK vs. MORSELL ET AL.

- I. A deed of trust to secure a present indebtedness, and also to secure future advances within a given time, and to a specified amount, is a good and valid security unless some right intervenes before the advances are made.
- II. It is sufficient compliance with the revenue laws, if the deed is stamped for the amount of the then debt, and it is also sufficient if each bond taken on a new advance to be secured by the deed is stamped for the amount it represents.
- III. A judgment creates a lien on an equity of redemption of real estate from the time it is recorded.

STATEMENT OF THE CASE.

The object of this bill is to establish and enforce the lien of a judgment upon an equity of redemption on lot 44, reservation 10, in the city of Washington, and to have two deeds of trust upon the same property declared defective by reason of not being properly stamped.

The judgment in favor of the bank was docketed January 24, 1871, and that of Skinner & Co., intervening creditors, February 20, 1871.

The defendant, Morsell, on about the 4th day of November, 1867, purchased said lot from the defendant Howard, and executed a deed of trust to secure the payment of the purchase-money. There is no objection to the payment of the balance due thereon, amounting to about \$1,000.

On or about the 21st day of October, 1869, said Morsell executed and delivered a second deed of trust to the defendants, Jones and Woodward, upon the same property, to secure the payment of a bond in the penal sum of ten thousand dollars, of even date with said deed, to the defendant, the Washington Co-operative and Deposit Association. This deed recites that Morsell is indebted to the said association in the sum of \$3,050 then advanced to him, and that said deed is made to secure the payment, "as well the said sum of \$3,050, as also any and all other and future advances which may hereafter, within five years from the date hereof, and to

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the extent of said sum of ten thousand dollars, be made by said association to said Morsell."

This deed was stamped as a security for \$3,050, the then actual debt.

Up to the 22d day of January, 1870, the association had advanced to Morsell at different times the sum of \$6,000, and had taken from him as security for such advances nine other bonds, in addition to the bond mentioned in and secured by the deed of trust of October 21, 1869, and of like tenor, and expressed on their face to be secured by the deed of trust last mentioned, and each bond was stamped for the amount it represented at the time of its execution.

March 4, 1871, a third deed of trust, executed by Morsell to Jones and Edson, on the same property, was recorded. This deed was made to secure a bond in the penal sum of \$10,000, and the money actually advanced by the same building association is therein stated to be \$1,060. This deed bears a stamp of the value of \$1.50.

On the 22d day of September, 1871, this bill was filed, and afterward in pursuance of a decree of the court the property was sold. The cause was then referred to the auditor to state the trustee's account and to distribute the fund. The auditor awarded priority to the building association's claims under both deeds. There was not sufficient funds to pay all of these claims of the association. The judgment-creditors then filed exceptions to the auditor's report, and the cause was thereupon certified here for hearing in the first instance.

J. J. Johnson and *R. K. Elliott*, for building association, contended that—

The judgment in the present case was no lien at law upon Morsell's equity of redemption in the property, the proceeds of which are in controversy here. Assuming it to have been a lien in equity, it could not become such, under the circumstances of this case, until the building association had had notice of proceedings in equity to enforce it. This, it is submitted, has always been the uniform rule in this District prior to the passage of the act of the local legislature, (Au-

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gust, 1871,) constituting judgments at law liens upon equities of redemption.

A court of equity will not treat a judgment as a lien *per se* on equitable estate. 2 Story's Eq. Jur., sec. 1216, (6.)

There was no illegality in the failure to stamp the first deed of trust executed by the defendant Morsell, to secure the building association, as a security for ten thousand dollars, for the reason that, as the advances were made under its provisions, bonds duly stamped were and could have been legally taken, and the statute does not contemplate a double stamp-tax when two papers having reference to the same security are executed. Act of June 30, 1864, sec. 152, 2 Brightley's Digest.

Enoch Totten for complainant and creditors:

First. The deed of trust of October 21, 1869, constitutes an incumbrance for only the sum of \$3,050. That sum was actually advanced, and was the present debt at the time the deed was made, and the deed was stamped for that sum. In order to render it an incumbrance *of record* for \$10,000, it was necessary to put upon it a stamp of the value of \$10. 2 Brightley's Digest, 379 (§ 371) and 371 (§ 333.)

Second. The deed of trust of March 1, 1871, is defective in the same way and falls under the same rule.

Third. The judgment of the bank, and that of Means, Skinner & Co., having been docketed before the record of the deed of trust of March 1, 1871, are entitled to priority over it. A judgment docketed constitutes a lien upon an equity of redemption. *Coombs vs. Jordan*, 3 Bland's Ch. R., 302; *Lee vs. Stone*, 5 G. & J., 19; *Campbell vs. Morris*, 3 Harris & McH., 535; *Taylor vs. Thompson*, 5 Peters, 367; 1 Powell on Mortg., 461; *Haley vs. Williams*, 1 Leigh, 140; *Coutts vs. Walker*, 2 Leigh, 268; *Benton vs. Smith*, 13 Peters, 483; *Coote on Mortg.*, 31 and 516; *McCormick vs. Digby*, 8 Blackford, 99.

CARTTER, Ch. J., delivered the opinion of the court to the effect following:

He first disposed of the objection that the deed of trust

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dated October 21, 1869, was not properly stamped, and held that the deed was a security at the time of its execution only for the sum of \$3,050, and was properly stamped for that amount. The deed recites that it is given to secure the amount then due, and all future advances within five years from the date thereof to the extent of \$10,000. It is a settled principle of law that a mortgage or other security is good and valid for the purpose of creating a lien for future advances, unless an intervening right or equity may claim priority by effecting the title before the advances are made. The bonds taken in this case represented on their face that they were secured by the deed of trust. A new bond was given for each advance, and was stamped for the amount represented, so that the additional stamps were used from time to time as the indebtedness to be secured was increased. This is a sufficient compliance with the revenue laws enacted by Congress relating to this subject; and as the bonds had all been executed and delivered previously to complainant's judgments, the auditor in making his computation properly gave them a preference over the latter.

The same observations would apply to the trust-deed of March 11, 1871, were it not for the fact that it had no existence until a period of two months after the judgments in favor of the bank and the intervening creditors. The building association made a new loan and took a new security for it which did not attach to the equitable title of the property until after the judgments had taken effect. It is impossible to say that the indebtedness secured by the last deed accrued as an advance under the first deed, for it was an independent transaction, and cannot be made to overreach any previously-acquired right. The question then occurs, whether the equity of redemption existing in Morsell, the judgment-debtor, was liable to the lien of the judgments. The court are of opinion that equity recognizes the lien and will enforce it against subsequent incumbrances. This doctrine has been much discussed, and it is said, has never prevailed in this District. The auditor in his report states that this is the first instance in which the question has been presented, so that it is still open for determination here. We think the jurisdiction may be maintained on principle. It is well

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settled in equity that a deed like that under consideration is a mere security, and the grantor is regarded as still being the owner of the property. If then he has the title in equity, is there any more reason for a judgment being a lien upon the legal estate at law than there is for it being a lien upon the equitable estate in this jurisdiction? The relief ought to be administered only after the judgment-creditor has exhausted his remedies at law. This doctrine has been maintained under certain circumstances in Virginia and Maryland, and has been referred to with approbation by the Supreme Court of the United States. (*United States vs. Morrison*, 4 Pet., 124; *Burton vs. Smith*, 13 ib., 483.)

The judgments in this case antedate the last trust-deed, and we think the plaintiffs are entitled to assert their prior lien.

The third exception to the auditor's report, which postpones the judgments to the deed, is sustained, and a decree may pass in conformity with the decision now made.

CAROLINE COLEMAN vs. BARBARA FREEDMAN.

AT LAW.—No. 11,896.

- I. The writ of certiorari lies from the supreme court of the District of Columbia to justices of the peace in civil actions before judgment, in all cases where the amount in controversy exceeds the sum of fifty dollars.
- II. This court has jurisdiction concurrently with justices of the peace when the claim or demand exceeds the sum of fifty dollars, and as there is no provision for the removal of such cases from said justices by appeal into this court after a jury trial, the proper course is to bring them here by certiorari to be tried in the first instance.

STATEMENT OF THE CASE.

The plaintiff makes a motion to quash the writ of *certiorari* on the ground that it has been improperly awarded in this case. The defendant alleges in her petition for the writ that the plaintiff has caused a summons to be issued by one Simon Joseph, a justice of the peace for the District of Columbia, against her to recover the sum of \$61.65, which the plaintiff alleges to be due her from the said petitioner. The petitioner then represents that this court has concurrent jurisdiction in all suits with justices of the peace wherein the amount in controversy exceeds the sum of \$50, and that she is entitled by law to elect whether she will be sued in this court, or before said justice of the peace; that she has signified to said justice her election to be sued in this court, and has requested him to certify the said suit to this court, but that he refuses to do so, and that he intends to proceed in said cause. She therefore prays that the writ may issue, and that the cause be heard and determined here.

The motion to quash was certified to be heard at the general term in the first instance, and the point presented is whether, under the circumstances stated, *certiorari* can issue from this court in a civil action before judgment to a justice of the peace. A reference to the statutes as to the jurisdiction of these inferior tribunals becomes necessary.

Coleman vs. Freedman.

By the act of February 27, 1801, section 11, 2 Statutes, 107, justices of the peace had civil jurisdiction to the value of twenty dollars, which was enlarged by the first section of the act of March 1, 1823, to fifty dollars. And the sixth section enacts that the judges of the circuit court of the District of Columbia shall not hold original plea in said court in cases within the jurisdiction given to justices by that act; making their jurisdiction up to fifty dollars exclusive. The seventh section provides for an appeal to the circuit court where the debt exceeds five dollars by either party who is aggrieved by *the judgment of a justice of the peace*, and the thirteenth section provides that after issue joined where the sum demanded exceeds twenty dollars, either of the parties to the suit may demand that the action be tried by a jury, but there is no provision for an appeal, after a jury trial, to this court.

The civil jurisdiction of justices of the peace was again enlarged by the act of February 22, 1867, to cases where the amount claimed does not exceed one hundred dollars, and this is the law, still in force, but the jurisdiction of this court is not interdicted, except as provided in the sixth section of the act of March, 1823, already mentioned, so that in all cases where the amount in controversy exceeds the sum of fifty dollars the jurisdiction of this court remains.

R. Ross Perry, for petitioner, contended that, as this court had jurisdiction of the subject-matter, it may issue a *certiorari* to an inferior court having cognizance of the same cause of action, and if the plaintiff proceeds in the inferior one the defendant may have a *certiorari* to bring the cause here to be decided; that the demand claimed in this case exceeded the sum of fifty dollars, and it was the right of petitioner to have the action to be tried by a jury, and in case of an illegal verdict there was no mode by which she could obtain redress by an appeal to a superior court; that this is the well-established practice, and cited the following authorities: *Cross vs. Smith*, *Ld. Raymond*, 836; *Evans Pr.*, 500; *Tidd Pr.*, 397; *7 Modern*, 138.

L. G. Hine, for the plaintiff, discussed the bearing of the statutes already cited.

By the COURT :

Upon the direct authorities cited by the counsel for petitioner sustaining such a use of the writ, the court were all of the opinion that it will lie in this case. And as there is no provision for the removal of cases after a jury-trial by appeal into this court, the proper course is to bring it here by *certiorari* when the amount in controversy is evidently within the jurisdiction of the court.

Motion to quash denied.

WM. DAVISON & CO. vs. VIRGINIA WHITTLESEY
ET AL.

IN EQUITY.—No. 3048.

- I. The dower-right of a widow, which has not been assigned to her, may be subjected, in equity, to the payment of her own debts contracted since the death of her husband.
- II. When it is manifest that an assignment of dower by metes and bounds is not practicable, a receiver will be appointed to take charge of and rent out the property until the widow's share of the rents and profits shall be sufficient to satisfy the judgment and costs.

STATEMENT OF THE CASE.

The bill was filed by a judgment-creditor, setting forth the judgment at law against the defendant, Virginia Whittlesey, for the sum of \$1,545.58, and that execution thereon had been returned unsatisfied. The bill also alleges that one Comfort S. Whittlesey, husband of the said Virginia, departed this life intestate in 1864, seized in fee-simple of a lot of ground in said District which is described; and that his widow, the said Virginia, is entitled to her dower-estate therein, and complainants ask that such interest may be subjected to the payment of their judgment. The other defendants are heirs of the intestate, and the answers admit the material averments of the bill.

Leigh Robinson and Reginald Fendall for complainants :

Possible and contingent interests, far more vague and indeterminable than a right of dower, which may at any moment be ascertained and assigned, are susceptible of equitable transfer. However incapable of assignment at law, a chose in action, if it be in substance a right of property, is treated in equity as of that character, and may be transferred by an assignment or agreement to assign. A widow's right of dower is no exception to this rule. "The want of formal assignment of dower," said Lord Cowper, "is nothing in equity,

since the widow's right in conscience is the same as if it had been made." *Hamilton vs. Mohun*, 1 P. W., 122. In this forum, therefore, a wife's right of dower is practically susceptible of sale. *Baldwin vs. Banister*, 3 P. W., 251. This species of equitable transfer has been repeatedly enforced in the courts of the States of this Union.

Wm. John Miller for defendants.

Mr. Justice WYLIE delivered the opinion of the court :

The only question to be decided in this case is, whether the dower-right of a widow, which has not been assigned to her, may be subjected in equity to the payment of her own debts, contracted since the death of her husband. At law, until after dower has been set off to the widow, she is regarded as possessing no estate in the property which she can alien or subject to the payment of debt; so that neither by process of law, nor by her own act, can her right be assigned so as to vest it in another. She may release this right it is true, but only so as to unite it with the fee. (See *Seymour vs. Minturn*, 17 Johns. R., 167; *Jackson vs. Aspel*, 20 ib., 412; *Croade vs. Ingraham*, 13 Pick. R., 33; *Blain vs. Harrison*, 11 Ill. R., 384; *Gooch vs. Atkins*, 14 Mass., 378.)

But in equity it is otherwise. It was decided by the Chancellor in *Tompkins vs. Fonda*, 4 Paige Ch. R., 448, that the widow has no right, in conscience, to deprive her creditors of the benefit of her right of dower for the satisfaction of their claims, by continuing in joint possession with the heirs and neglecting to ask for a formal assignment; which assignment if made would enable the creditors to reach her dower by execution.

It is manifest in this case that an assignment of dower by metes and bounds is not practicable. The widow's interest can be reached only through the rents and profits. A receiver must therefore be appointed, with power to take charge of and rent out the property in question until, from the widow's share of the rents and profits, the judgment in favor of the complainants shall have been satisfied; also the costs of this suit

Philp & Solomon vs. Gardner & Angus.

PHILP & SOLOMON vs. GARDNER & ANGUS.

An appeal does not lie to the general term from an order made at the circuit, setting aside a verdict for plaintiffs and granting a new trial.

STATEMENT OF THE CASE.

The jury having returned a verdict for plaintiffs, the defendant Angus filed his motion for a new trial on the grounds that the verdict was contrary to the law of the case, and also contrary to the evidence given on the trial. The motion was sustained by the court below and a new trial ordered. From this decision the plaintiffs have brought the present appeal.

A. G. Riddle for plaintiff.

W. F. Mattingly for defendant Angus.

By the COURT:

Without bearing the argument on the merits of this appeal, we are of opinion that it must be dismissed for the reason that an order setting aside a verdict in favor of the plaintiff, and granting a new trial, cannot be reviewed here on appeal. The motion for a new trial is addressed to the sound discretions of the justice before whom the trial was had. This is according to the common-law practice, and the act of Congress organizing this court has not changed the rule, except a case or bill of exceptions shall be settled in the usual manner. Brightly's Dig., 177, sec. 8.

The appeal must, therefore, be dismissed and the case remanded to the circuit.

Starr vs. Keefer et al.

the said Joseph A. Keefer and Elizabeth L. Keefer, his wife, and to hold the same until the aforementioned child or children shall have become of age, and in the mean time to apply the rents, issues, and profits arising therefrom to the support, maintenance, and education of the said child or children."

And further on is the following additional provision on the same subject:

"And it is hereby expressly understood and covenanted that the said Joseph A. Keefer and wife may at any and all times hereafter, prior to the said child or children coming of the age of twenty-one years, dispose of said property for the benefit of said child, without let or hinderance by said William Tucker, his heirs or executors; and upon the re-investment of the said money it shall be, as expressed in this indenture, in the name of the said William Tucker as trustee, or, in the event of his death, the said Keefer and wife may appoint another in his stead."

Upon the first of these clauses in the deed, the complainant contends that Keefer has an equitable life-estate in the property, and that his wife has also a vested interest therein; and he asks that said interests may be sold and the proceeds applied to the satisfaction of the said judgment. In their answer, the defendants last named set up various matters in avoidance of the judgment. A replication was filed, but there was no evidence on the part of the said defendants. They, however, claim that the property is in no manner liable for their debts, and that it is vested for the sole benefit of their children; and they ask the court to construe the deed so as to give to it this effect.

The case comes to the general term upon an appeal from a decree made at the special term dismissing the bill with costs.

R. B. Washington and *William W. Boardman*, for complainant, made the following point as to the construction of the deed:

It is clear, from the deed to William Tucker, that the defendant Joseph A. Keefer has an equitable life-estate in the property in question, because the trustee is to permit him

SARA S. SPENCER vs. THE BOARD OF REGISTRATION.

AT LAW.—No. 8467.

SARAH E. WEBSTER vs. THE SUPERINTENDENTS OF ELECTION.

AT LAW.—No. 8468.

- I. Male citizens only can exercise the elective franchise in the District of Columbia.
- II. The elective franchise is not a natural right and is made to rest, in the United States, upon the authority of law which defines the qualifications of those citizens who may exercise it.
- III. By the first clause of the fourteenth amendment the plaintiff and all other persons born in the United States are citizens thereof, and are therefore capable of becoming voters. But the amendment does not execute itself, and it requires legislative action to authorize them to vote. Congress has carried this right into effect in this District, by extending its exercise only to male citizens.

STATEMENT OF THE CASE.

In the first of the above-entitled actions the plaintiff, in her declaration, alleges that the defendants were the board of registration of the legal voters in the District of Columbia, at an election for a Delegate to Congress and other officers to be holden on the 20th of April, 1870; and that registration was a legal prerequisite to the exercise of the elective franchise; that she presented herself to said board and gave her name and residence; that she was of full age and a citizen entitled to vote at said election, and demanded that her name should be registered with the other legal voters; which said request and demand the defendants wrongfully refused, and her name was not registered. That, afterward, at the election for said Delegate, &c., she offered her vote to the proper judges of said election accompanied by proof of her attempt to register;

I.

The right to vote is a natural right.

The foundation of American politics is, that the right of self-government is natural. (2d Par. Declaration of Independence.)

"All power is inherent in the people," is the declaration of the first bill of rights in the last edition of the State constitutions, and repeated in nearly all of the thirty-four, which follow. (Amer. Const., ed. 1864.)

Not one of these instruments pretends to create and confer the right of self-government. They recognize it as natural and pre-existent, and only furnish the means for its exercise.

This is strikingly shown in the discrimination which each of these constitutions makes, by the exclusion of certain classes from the exercise of the elective franchise. Their nearly uniform language is "all *white male* citizens of the age," &c., may vote. (Amer. Const.)

These provisions, so carefully inserted, alone prevented women and colored persons from the exercise of the elective franchise; and are the broadest admissions of their inherent right to vote.

II.

At common law, women entitled to vote. *In re Jane Allen*, Law Mag., 1868-'9, p. 121; *Olive vs. Ingram*, 7 Mod. Rep., p. 263; Anstey's Notes, pp. 74-104.

III.

The fourteenth amendment.

In the Constitution, as it existed with its old amendments, no restriction or limitation can be found of the natural right of persons to exercise the elective franchise.

The fourteenth amendment declares:

"SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."



within what class of political rights does it fall? If the 14th amendment does not confer the elective franchise, it is without effect. Before its adoption, every person born in the United States, and subject to the laws, could do every other thing and enjoy every other right except to vote. Will it be contended that this article secured nothing, advanced nothing, and conferred nothing? And were the States thus solemnly denied the right to abridge nothing?

IV.

The fifteenth amendment and its bearing on the issue.

Colored male persons excluded from voting by the word "white" in the State constitutions, as were women by the word "male," have voted—and, it is conceded, rightfully—since the adoption of the 15th amendment, although this word "white" still stands in the various constitutions. This is conclusive of the matter in this issue.

That amendment declares:

"SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SEC. 2. The Congress shall have power to enforce this article by appropriate legislation." (15 Stat., p. 346.)

This article not even by implication confers the right of suffrage upon any person, nor does it profess to.

It recognizes the right as already existing, and insures its exercise.

It prohibits all interference with the right of certain persons to vote; not because they are of a race, nor because of their color, nor yet because they had been slaves, but wholly and solely because they are citizens of the United States, thus forever affirming that whatever other rights citizens as such may possess, their right to vote shall never again be questioned.

It is true this amendment was made in the interest of the colored race, but in making it Congress and the States have in part defined the term citizen, in the interest of all persons, and all are alike entitled to the benefits of their work.

Colored persons are thus declared voters solely because they are citizens.

When we recur to the 14th amendment we find that they became such citizens solely because they were a part of the "all persons born, &c., in the United States."

The effect of this 1st clause of the 14th amendment was merely to override by superior power their exclusion from the exercise of their always acknowledged inherent right of self-government. It confers no new rights, but admits them to a new enjoyment of a very old one.

Women "born or naturalized in the United States" are one half of the "all persons" of this amendment; affected, carried forward, and elevated by the same power, to precisely the same place. It deals with all alike. In its presence the excluding word "male" is exorcised from the State courts, and from the act of Congress in force in this District, and the plaintiffs were entitled to vote at the election referred to.

This amendment merely declares and vindicates the natural and common law in favor of women.

It will be difficult to find a vice in this argument, or avoid the force of this conclusion.

William A. Cook for defendants.

CARTTER, C. J., delivered the opinion of the court:

These cases, involving the same questions, are presented together.

As shown by the plaintiffs' brief, the plaintiffs claim the elective franchise under the first section of the fourteenth amendment of the Constitution.

The fourth paragraph of the regulations of the governor and judges of the District made registration a condition precedent to the right of voting at the election of April 20, 1871.

The plaintiffs, being otherwise qualified, offered to register, and were refused. They then tendered their ballots at the polls, with evidence of qualification and offer to register, &c.,

Spencer vs. The Board of Registration.

when their ballots were rejected under the seventh section of the act providing a government for the District of Columbia.

Mrs. Spencer brings her suit for this refusal of registration, and Mrs. Webster for the rejection of her vote, under the second and third sections of the act of May 31, 1870.

The seventh section of the organic act, above referred to, limits the right to vote to "all male citizens;" but it is contended that, in the presence of the fourteenth amendment, the word *male* is without effect, and the act authorizes "all citizens" to exercise the elective franchise.

The question involved in the two actions which have been argued, and which for the purposes of judgment may be regarded as one, is whether the plaintiffs have a right to exercise within this jurisdiction the elective franchise. The letter of the law controlling the subject is to be found in the seventh section of the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia," as follows:

"And be it further enacted, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are *non compos mentis* and persons convicted of infamous crimes, shall be entitled to vote at said election in the election district or precinct in which he shall then reside and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage."

It will be seen by the terms of this act that females are not included within its privileges. On the contrary, by implication they are excluded. We do not understand that it is even insisted in argument that authority for the exercise of the franchise is to be derived from law. The position taken is that the plaintiffs have a right to vote independent of the law; even in defiance of the terms of the law. The claim, as we understand it, is that they have an inherent right, resting in nature, and guaranteed by the Constitution in such

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wise that it may not be defeated by legislation. In virtue of this natural and constitutional right, the plaintiffs ask the court to overrule the law, and give effect to rights lying behind it and rising superior to its authority.

The court has listened patiently and with interest to ingenious argument in support of the claim, but have failed to be convinced of the correctness of the position, whether on authority or in reason. In all periods and in all countries, it may be safely assumed that no privilege has been held to be more exclusively within the control of conventional power than the privilege of voting, each state in turn regulating the subject by the sovereign political will. The nearest approach to the natural right to vote or govern—two words in this connection signifying the same thing—is to be found in those countries and governments that assert the hereditary right to rule. The assumption of divine right would be a full vindication of the natural right contended for here, provided it did not involve the hereditary obligation to obey.

Again, in other states, embracing the republics, and especially our own, including the States which make up the United States, this right has been made to rest upon the authority of political power, defining who may be an elector, and what shall constitute his qualification; most States in the past period declaring property as the familiar basis of a right to vote; others, intelligence; others, more numerous, extending the right to all male persons who have attained the age of majority.

While the conditions of the right have varied in several States, and from time to time been modified in the same State, the right has uniformly rested upon the express authority of the political power, and been made to revolve within the limitations of express law.

Passing from this brief allusion to the political history of the question into the consideration of its inherent merits, we do not hesitate to believe that the legal vindication of the natural right of all citizens to vote would, at this stage of popular intelligence, involve the destruction of civil government. There is nothing in the history of the past that teaches us otherwise. There is little in current history that promises a better result. The right of all men to vote is as fully rec-

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oguized in the population of our large centers and cities as can well be done, short of an absolute declaration that all men shall vote, irrespective of qualifications. The result in these centers is political profligacy and violence verging upon anarchy. The influences working out this result are apparent in the utter neglect of all agencies to conserve the virtue, integrity, and wisdom of government, and the appropriation of all agencies calculated to demoralize and debase the integrity of the elector. Institutions of learning, calculated to bring men up to their highest state of political citizenship and indispensable to the qualifications of the mind and morals of the responsible voter, are postponed to the agency of the dram-shop and gambling hell, and men of conscience and capacity are discarded to the promotion of vagabonds to power.

This condition demonstrates that the right to vote ought not to be, and is not, an absolute right. The fact that the practical working of the assumed right would be destructive of civilization is decisive that the right does not exist.

Has it become a constitutional right, under the provisions of the fourteenth and fifteenth amendments of the Constitution? which provide as follows:

Fourteenth amendment, section 1.—“All persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

Fifteenth amendment, section 1.—“The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.”

Section 2.—“The Congress shall have power to enforce this article by appropriate legislation.”

It will be seen by the first clause of the fourteenth amendment, that the plaintiffs, in common with all other persons born in the United States, are citizens thereof, and, if to make them citizens is to make them voters, the plaintiffs may, of right, vote. It will be inferred from what has already been said, that to make a person a citizen is not to make him

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or her a voter. All that has been accomplished by this amendment to the Constitution, or by its previous provisions, is to distinguish them from aliens, and make them capable of becoming voters.

In giving expression to my own judgment, this clause does advance them to full citizenship, and clothes them with the capacity to become voters. The provision ends with the declaration of their citizenship. It is a constitutional provision that does not execute itself. It is the creation of a constitutional condition that requires the supervision of legislative power in the exercise of legislative discretion to give it effect. The constitutional capability of becoming a voter created by this amendment lies dormant, as in the case of an infant, until made effective by legislative action. Congress, the legislative power of this jurisdiction, as yet, has not seen fit to carry the inchoate right into effect, as is apparent in the law regulating the franchise of this District. When that shall have been done, it will be the pleasure of this court to administer the law as they find it. Until this shall be done, the considerations of fitness and unfitness, merit and demerit, are considerations for the law-making power. The demurrer in these cases is sustained.

HERMAN SCHMIDT vs. SMITH PETTIT.

AT LAW.—No. 8302.

- I. By lease for years it was provided that if the premises should be destroyed by fire the rent was to cease until the landlord should put them in good order and condition, but the landlord did not otherwise covenant to rebuild, and the building was destroyed by fire during the term :
- a. HELD, that, as the lessor was not obliged to rebuild, by mutuality of obligation, the tenant could not be held liable for rent after the house was rebuilt unless he elected to enter into possession of the restored premises.
- b. HELD, also, that in such case the destruction of the premises by the fire put an end to the lease.
- c. HELD, also, that it is a sound principle, where the lease contains no covenant to the contrary, destruction of the subject-matter of a lease will terminate the lease.
- II. A covenant in a lease that the tenant shall keep the premises in good order, and deliver the same in good order as "they are now," on the expiration of the lease, binds the tenant to rebuild in case the premises should be destroyed by fire, and if he abandons them, and the landlord takes possession and erects a more costly and commodious structure, the tenant cannot maintain an action to compel him to pay the difference between the rental value of the property before and after the fire.

STATEMENT OF THE CASE.

This action is brought by a lessee to recover damages from his landlord for eviction before the expiration of his lease. The contracts relied upon are a lease and a renewal, both in writing, and both set up in the declaration, and used in evidence upon the trial. The original lease bears date August 12, 1864, whereby the defendant, Smith Pettit, demises to one Julius Weibel "all that messuage, tenement, and premises known as house No. 468 Eleventh street west," in the city of Washington, for the term of five years from the 1st day of August, 1864. The only stipulation in this deed necessary to notice is the following: "If the said premises, or any part thereof, shall be destroyed by fire or other casualty so that

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the same shall be untenable, that then, and in such case, the said rent shall cease until the said Smith Pettit, his heirs or assigns, shall rebuild, or put the said premises in good tenatable order and condition."

The rent reserved was \$190 a month for the first two months, and \$80 a month for each month thereafter during the term. Weibel took possession under his lease, and it was assumed and conceded that some time previous to the renewal, presently to be mentioned, he assigned his interest therein to the plaintiff, Herman Schmidt. The said renewal was made to said Schmidt in these words:

"WASHINGTON, D. C.,

"December 10, 1868.

"For value received, I hereby renew the above lease of the premises therein described for the period of three years from the first day of December, 1868, thence next ensuing, and fully to be complete and ended, yielding and paying therefor the said rent, and on the same covenants therein contained, with the additional covenant that the said Herman Schmidt shall keep the said premises in good order and repair during the said demise or lease, and deliver the same in as good order as they are now, on the expiration of the said lease.

"SMITH PETTIT."

The renewed lease was to expire on the first day of December, 1871; but on the fourth day of March, 1870, the leased premises were destroyed by fire. The declaration then alleges that the defendant proceeded to rebuild said premises, and had the same completed by the first day of September, 1870, and that plaintiff on said last-mentioned day, "and at many other times at the place aforesaid, requested and demanded of the defendant to give to the plaintiff possession of said premises, and to permit the plaintiff to occupy the same, as he was legally and justly entitled to under said lease and renewal, yet the defendant refused to give the plaintiff possession of said premises, and to permit him to occupy the same, and hath ever since refused so to do, whereby the plaintiff lost and was deprived of the annual rental value of said premises from the first day of September,

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1870, to and including the first day of December, 1871, and which rental-value during that period was two thousand five hundred dollars per year.

The pleas of the defendant were, in substance, the general issue, except the fourth and fifth, which are here given in substance, together with the demurrer thereto, and which demurrer was sustained by the circuit court.

"And for a further plea the defendant says that after the partial burning of said premises, as alleged, the plaintiff did not rebuild or repair said premises in accordance with the terms of the lease and renewal and under which he held said premises.

"TAYLOR & WOOD,
"Attorneys for Defendant."

"DEMURRER.

"The plaintiff says the foregoing plea is bad. The point to be argued is, that the plaintiff was not bound to repair.

"MOORE & BRIGHT AND GRAY,
"For Plaintiff."

Whereupon the issue of fact was tried by a jury at the October term of the circuit court in 1872. For the purpose of illustrating the decision following, it is only necessary to state the third instruction asked for by the defendant on said trial, which is here given :

"3d. That under the terms of the lease and renewal the plaintiff was legally bound to rebuild or repair the said premises, if destroyed in whole or in part, by fire, so as to render the same tenantable."

This prayer was refused, and the defendant made his exception to such refusal, and the verdict was in favor of the plaintiff.

Moore & Bright and Gray for the plaintiff:

The points on their brief are not given, as they refer to a matter which it became unnecessary for the court to consider.

Taylor & Wood, for the defendant, made the points following, *inter alia* :

The legal effect of the *additional* covenant in the renewal is to compel the plaintiff to rebuild or repair in case of fire. The legal effect of the covenants of the original lease is to keep in repair, fire and other casualty excepted, the one being an absolute, and the other a qualified covenant to repair. Can they be made to stand together? The only way this can be done is to make the qualifying words "fire or other casualty excepted," which qualify the original covenant, also to qualify the absolute covenant in the renewal. If this is done in this case, then the *additional* absolute covenant on which the lease is renewed is made to be the same qualified covenant that is found in the original lease, and not an additional covenant, or, in other words, it has no effect at all; is a mere nullity. We think the words "*additional* covenant" show that it was intended by the lessor that this covenant in the renewal should have its legal effect, and that the qualifying words, "fire or other casualty," contained in the original lease were "*ex industria*" omitted in this absolute *additional* covenant contained in the renewal.

Under the same rule of construction applied by the court, if the original lease contained an absolute negative covenant, as that the "tenant should '*not*' repair," or should repair "under no circumstances," and the renewal contained the additional affirmative covenant to repair generally, (in legal effect to rebuild in case of fire,) then these two inconsistent covenants might be made to stand together by applying the same principle of construction, viz, by taking out the qualifying negative words, "not" or "under no circumstances," from the first covenant in the lease, and making them qualify the affirmative covenant in the renewal; and thus any two covenants, however inconsistent, might be made to stand together.

We think that as the renewal is the last contract, and made with a different party, (in whom the lessee might have had less confidence that he would protect the property from accident by fire,) that if either covenant controls the other, (as being inconsistent with it,) that effect should be given to the last

additional covenant contained in the renewal, just as a clause in the codicil of a will controls any clause in the will inconsistent with it.

If the plaintiff was bound to rebuild, and did not, having paid no rent, the whole consideration has failed, and also there has been a breach of the covenant of plaintiff to rebuild, which formed the condition of the renewal; and the plaintiff's action for damages should not have been sustained, but the demurrers overruled.

Also, if plaintiff was bound to rebuild, and did not, the measure of damages given by the court was wrong, as the breach of the covenant to rebuild should have been allowed to mitigate the damages to the extent of the increased rental value claimed by the plaintiff in this action.

Mr. Justice WYLIE delivered the opinion of the court :

According to the terms of the old lease, the rent was to cease until the house should be rebuilt by the landlord, but that lease contained no covenant binding the landlord to rebuild at all; so that he was left at liberty to rebuild or not at his option. If he chose not to rebuild during the term, the tenant was to be discharged from the payment of rent.

And since mutuality of obligation is necessary in every contract, the tenant could not have been held for the rent after the house had been rebuilt, unless he elected to enter into possession of the restored premises. If, then, the landlord was not bound by any covenant to rebuild, and this discharged the tenant from his obligation as to the payment of rent, the lease was put an end to by the fire.

In *Brown vs. Quilter*, cited in 1 Selw., N. P., 471, Ld. Northington, Ch., said: "There is not any covenant from the landlord to rebuild. A court of equity can decree a specific performance in those cases only where clear directions can be given in what manner and when the act is to be performed. It would be most arbitrary in me to decree a rebuilding in a case where there is not any covenant for the rebuilding. All that can be required from a court of equity is, in a case like this, when the action shall be brought for rent, to order an injunction until the houses are rebuilt or the lease delivered

up. In the present case there has not been any action brought for the rent, and the defendant (the landlord) has offered to accept a surrender of the lease, which is all the relief the plaintiff is entitled to."

Thus far we have assumed that the old contract, so far as it related to rebuilding, in case of fire, was in force between the parties to the renewed one. Under that the tenant was not bound to rebuild, nor was the landlord. But if the premises should be destroyed by fire the tenant was to be released from payment of rent, and the loss was to fall upon the landlord. But this was changed in the new agreement, which provided for an extension of the term to a new party at the former rent, "and on the same covenants therein contained, *with the additional covenant that the said Herman Schmidt shall keep the said premises in good order and repair during the said demise, or release and deliver the same in as good order as they are now on the expiration of the said lease.*"

Now, by all the authorities, this agreement bound the tenant himself to rebuild in case the premises should be destroyed by fire. We have seen that the first contract bound neither the landlord nor the tenant to rebuild in case the premises should be destroyed. The covenants of the old contract became, by reference, the terms of the new one, except as to this one additional stipulation, which bound the tenant in express and distinct terms. It may not have been the intention of either party to make it so, but the agreement is written, and we are bound to interpret it by its own terms; and in a case of such iniquity as the present claim it is not a matter of regret to find the plaintiff defeated by any accident.

As has been stated, the fire occurred on the 4th of March, 1870. The tenant, Schmidt, then abandoned the premises and they were taken possession of by the defendant, his landlord, who erected, and by the month of September following had completed, an expensive and commodious building, of which he took possession and occupied with his family, the rental value of which plaintiff claims to have been at the rate of \$2,500 a year. The rental value of the property before the fire was shown not to exceed the amount of the reserved rent, namely \$960. The object of the present action is to compel the landlord to pay the difference to his tenant for

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the unexpired portion of the term, a little more than one year, and, under the instructions of the court below, the jury did find in his favor damages to the amount of \$690.

But there remains to be presented another view of this subject, which we deem fatal to the plaintiff's claim.

The subject of the lease was "all that messuage, tenement, and premises known as house No. 468 on Eleventh street west, in the city of Washington, D. C." It was not a farm, or a piece of land, nor a lot in the city, but a "house," used, as was shown in evidence, as a restaurant.

Now, it has been determined by several decisions in this country, and upon sound principle, that, where the lease contains no covenant to the contrary, destruction of the subject-matter of a demise will terminate the lease.

In *Winston vs. Cornish*, 5 Ohio R., 477, which was ejectment brought by the landlord to recover possession from the tenant after the demised premises had been destroyed by fire, the facts were these: The lease was of a store-room on the first floor and of the cellar beneath, in the city of Cincinnati. There were other rooms above, which were not included in the lease. The whole house had been burnt down during the existence of the lessee's term. The lessee then built another house over the cellar, but of only one story, so that the space it occupied was not more extensive, either on the ground or above, than the premises he had leased. The contract required the tenant to pay his rent during the whole term, with no exception as to fire. It was decided that, the subject of the lease having been consumed, the lease itself was at an end.

The same doctrine was followed in New York in the case of *Kerr vs. The Merchants' Ex. Co.*, 3 Edwards's Ch. R., 315, and in *Graves vs. Borden*, 29 Barbour, 100; and in Alabama in the recent case of *McMillan vs. Solomon*, 42 Ala., 356.

In *Alexander vs. Dorsey*, 12 Ga. R., the court say: "To rent lands is one thing, but to rent a room is another and a different thing. By the former, the land itself passes; by the latter, nothing but what comes strictly within the meaning of the contract. But when the whole has been destroyed by fire, it never was intended by the parties to prevent the

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landlord from re-entering the premises for the purpose of reconstructing."

In *Ainsworth vs. Ritt*, 38 Cal. R., 89, the court held that, "where there are no covenants to repair and where the land on which it rests is not leased also, the destruction of the building terminates the relation of landlord and tenant."

The judgment below is to be reversed.

DERR & THOMPSON vs. TIMOTHY LUBEY AND HIS
GARNISHEE, THE DISTRICT OF COLUMBIA.

AT LAW.—No. 2736.

The District of Columbia cannot be charged as garnishee upon process of attachment on account of the salary due from it to an officer of the District government.

STATEMENT OF THE CASE.

On the 14th day of December, 1866, the appellants, Derr & Thompson, recovered a judgment in the supreme court of the District of Columbia against the said Timothy Lubey for the sum of \$292.75, with interest from June 15, 1866, and costs of suit. Execution was issued on said judgment, which was returned *nulla bona*.

The judgment having become *dormant*, the same was, on the 13th day of June, 1871, revived by *scire facias*.

Lubey, the judgment-debtor, having been appointed water-registrar under the government of the District of Columbia, an attachment was taken out against his salary as such officer, in pursuance of the Maryland attachment-act of 1715, Chap. XL., sec. 7, (Thompson's Digest, 94,) and laid in the hands of the governor of said District, November 15, 1871.

On the 2d of January, 1872, the answer of the District of Columbia was filed, admitting that the sum of \$500 had been paid to Lubey, the judgment-debtor, after the attachment was laid, and setting up that the salary of Lubey, because he is an officer of said municipal corporation, is not subject to attachment.

Whereupon, the counsel of Derr & Thompson moved the court for judgment of condemnation against the said body-corporate on said answer. The court, however, overruled the motion for judgment. And this appeal is taken to reverse that decision.

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Robert Leech and Enoch Totten, for the plaintiff, relied on the following points:

1. The District of Columbia is a body-corporate for municipal purposes, capable of contracting and being contracted with, of suing and being sued, and of pleading and being impleaded in the courts.

2. The said "body-corporate for municipal purposes" can lawfully be charged as garnishee on account of salary due to one of its officers.

Act of Congress approved February 21, 1871, entitled "An act to provide a government for the District of Columbia," 16 Stat., 419; *Bray vs. Wallingford*, 20 Conn., 416; *Whidden vs. Drake*, 5 New Hampshire, 13.

William A. Cook, for the District of Columbia, cited 8 Maryland R., 95; 4 How., 20.

By the COURT:

The decision of the court below must be affirmed. We are all of the opinion that process of attachment will not lie to garnishee the salaries due from the District government to its officers, on the ground of public convenience and necessity.

NANNIE HAW vs. MARSHALL BROWN ET AL.

EQUITY.—No. 600.

A devise was made to an executor, his heirs, &c., in trust, to manage and dispose the property in his discretion for the husbanding and increase thereof during the minority of the two grandsons of the testator; one-half to be turned over to the elder coming of age, and the other half to the younger coming of age; and if either died, his share to go to the survivor. The elder attained the age of twenty-one, and died without having been married; and the survivor attained the age of twenty-one, married, and died intestate, leaving a widow. The survivor occupied the property and exercised ownership over the same until his death. No deed of conveyance was ever made by the executor to such survivor, and the said executor is now dead.

- I. HELD, that the executor took the legal estate for a particular purpose only until the devisees should severally arrive at the proper age; that, the survivor having taken possession, he became seized in deed and in fact, and thereby became invested with the full legal title, and that no conveyance from the executor was necessary, as the will itself did not prescribe that formality.
- II. HELD, also, that upon the death of the survivor his widow became entitled to an estate of dower in the premises.

STATEMENT OF THE CASE.

On the 13th day of October, 1847, Eliza Haw, who was then the wife of Henry Haw, was the owner of, and seized in fee-simple of, a farm in the District of Columbia, known as "Mount Pleasant and Pleasant Plains."

Henry Haw had issue by his said wife Eliza, and the said Eliza died in the life-time of her husband, who is still living.

After the death of the said Eliza, to wit, on the 31st day of July, 1849, said Henry Haw conveyed by deed his right, title, and life-estate, as tenant by the curtesy, to said farm to Rosanna Brown, his mother-in-law.

The will of Rosanna Brown, which was admitted to probate June 14, 1852, contained the following clause: "Third. I give and devise and bequeath all the rest and residue of

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my estate, except as in the last foregoing clause is excepted, unto my executor, hereinafter named, his heirs, executors, administrators, and assigns, in trust, to manage and dispose the same in his discretion for the husbanding and increase thereof while my two grandsons, John Haw and Jesse B. Haw, are under the age of twenty-one years, and to apply the income, or so much thereof as in his discretion he may deem necessary, equally between my said two grandsons, during their minority, for their support, maintenance, and education; and upon the elder of them coming of age to turn over and account to him for one equal half of my estate and property hereby bequeathed in trust, and in like manner upon the younger coming of age to turn over and account to him for the other equal half; and if either of my said two grandsons should die before coming of age, leaving no child or children born in lawful wedlock, then my will is that the share of him so dying shall go to and be invested in the survivor, and be accounted for to him by my said executor."

This clause devises the said interest in said farm conveyed by said Henry Haw to the testatrix on the 31st day of July, 1849.

The will appoints Henry C. Matthews as sole executor.

At the time of the conveyance of the estate by the curtesy to said Rosanna Brown two children, the only issue of the marriage of said Eliza Haw and Henry Haw, were living, namely, John Haw and Jesse B. Haw, the devisees referred to in the will. John, the elder, died in February, 1857, having attained the age of 21 years, and was never married. Jesse B. Haw, the survivor, and heir at law of John, attained twenty-one on the 11th of July, 1859, and married the complainant on the 3d of January, 1860, and died intestate on the 14th of April, 1863.

Jesse B. Haw, before and after attaining twenty-one years of age, occupied the dwelling-house on the farm, and after his marriage continued to live there with his wife. In the summer of 1861 they were compelled to leave in consequence of the war. During the aforesaid occupation he cultivated the farm and exercised ownership over the same, and after such occupation he continued in possession by his tenants and in the exercise of ownership until his death; but no

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deed of conveyance was made by said Henry C. Matthews, sole executor, to said Jesse B. Haw at the time or after he attained the age of twenty-one years, and said Matthews died in May, 1862.

Jesse B. Haw, before his death, viz, on the 2d March, 1863, conveyed part of said farm, consisting of the mansion-house and thirty acres, for the use of his wife, who after his death sold this part for \$30,000, but this deed was not expressed to be in lieu of dower.

Mrs. Haw is now a widow, about twenty-six years of age, and none of her children are now living.

At the time of Jesse B. Haw's death the farm remaining consisted of about ninety-six acres.

W. B. Todd and W. S. Cox, who bought the undivided third of G. B. Prentice, one of the heirs at law of Jesse B. Haw, paid Mrs. Haw, complainant, \$5,500 for a release of her supposed right of dower in their third.

The cause was certified to the general term to be heard in the first instance, and the question in the case is upon the construction of the clause in the will mentioned in the statement, and whether the executor took the legal title under the devise so as to take away the right of dower in the complainant.

W. D. Davidge, for complainant, contended that—

The executor under the will took no further than was sufficient to carry out and satisfy the trust; that the duty of the trustee is the measure of his title; that the words "and to dispose the same" are to secure the husbandry and increase of the estate during minority; and that the estate of the executor was a real-chattel interest, and that the word estate was used in its ordinary acceptation. Hill on Trusts, 239, 366; 12 Cushing, 448; 6 Wall., 458, 470; 16 Ves., 490; 4 Barn. & Cress., 336; 11 How., 499.

W. S. Cox, for himself and other defendants, argued that—

Where the trustee has power of selling, he is held to have the legal title. The language is "to dispose the same;"

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and this implies a power of sale, and consequently clothes him with the legal title. 4 Kent, 39 ; 12 Pet., 201 ; 1 Cruise Dig., title 11, chap. 3, p. 384 ; 5 East, 96 ; 3 Richardson, appendix, 468 ; 1 Sugden on Powers, 122 ; 1 Powell on Devises, 228, 221 ; 5 Pet., 481.

Mr. Justice HUMPHREYS delivered the opinion of the court :

In the case now before us, the defendants seek to defeat the claim of dower on account of the devise to the executor, his heirs, executors, administrators, and assigns.

Is there a purpose expressed for which this estate is handed over to the executor, and is that purpose so clear that the extent of the estate which the executor takes is controlled ?

Could the testatrix, by the use of words in connection with words conveying an absolute estate, so use them as to control the absolute estate and reduce it below a pure fee or a fee-simple ?

Not only may the language of the devise increase, but it may lessen the estate. The devise is to the executor, his heirs, executors, administrators, and assigns, in trust, to manage and dispose the same in his discretion for the husbanding and increase thereof while the two grandsons, John Haw and Jesse B. Haw, are under the age of twenty-one years, and to apply the income equally, &c., during their minority, for their support and education ; one-half of the estate and property bequeathed *in trust* to be turned over and accounted for to the elder coming of age, and the other half to be turned over and accounted for to the younger coming of age ; and if either should die before coming of age, leaving no child, his share should be accounted for by the executor to the survivor. Does this language create a trust ? If it creates a trust, is it a naked, dry trust, conveying no estate to the executor, but a trust estate, to be managed for the sole use and benefit of the two boys, or the survivor, during minority, and then to be delivered to them or to the survivor ? It is not denied that the executor held in trust. What estate then did he take. The legal estate was vested in him, but for a particular pur

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pose ; that purpose was to hold the property till events should happen which must happen in a given time. There was no contingency to defeat the arrival of the time that was to determine the tenure by which the executor held the land. It was certain to arrive, and when it did arrive, the power of the executor to hold any longer was at an end. When the time did arrive at which the right of control over the estate by the executor ceased, he, in fact, did not undertake to prevent the devisee in interest from entering on the land and enjoying the possession, taking the profits, and managing for himself.

At the appointed time the husband became seized in deed and in fact, and this seizure was legal, it was lawful, and it was out of the lawful power of the executor to prevent or defeat the entry. Either a court of law or a court of equity would have forced him to yield the possession to the owner. There are no words of the devise to indicate any higher property in the executor than most executors have who are appointed by testators for the purpose of managing an estate, real and personal, till the devisees severally arrive at the proper age. The law vests in executors, as a usual thing, the right to hold, at law, an estate, when the object is that the estate shall be kept together for a specified time, and during this period no one, not even the heir or ultimate devisee, can oust the executor, the trustee ; and in this way, and for the purpose of preserving the estate from waste and making it profitable, he is invested with the title, which is recognized as legal. But no deeds are required to be executed by the executor, unless the original power to the executor so prescribes. In making provision for settlements by the grantor in a deed or by a testator this might sometimes be highly proper. But where the language of a deed or will indicates nothing beyond a naked trust, for the sole purpose of preserving the property during the minority, there is no reason for requiring the formality of a deed from a trustee, who can convey no property except by virtue of the instrument, which itself goes to the beneficiary. Possession by the surrender of the trustee is a seizin of the beneficiary, and that which was his in equity has by the surrender and actual possession become his in law. Equity would have forced

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the trustee to surrender the possession; but if he has voluntarily done that which he could have been forced to do the law is satisfied, without calling in the aid of equity. The equitable and legal title now commingle and center in the same person, and even that ancient requirement of the law, livery of seizin, has been complied with. The record-evidence of title is the will, and the lawful owner is in possession. If this be correct, then seizin in deed, in fact, and seizin in law have been perfected.

Upon the death of John, the elder, Jesse B., the younger, became entitled to the whole estate, by the express provisions of the will. And on the arrival at the age of twenty-one of Jesse B., the will required the executor to account to him for the share of John, and by the language and express terms of the will the share of John was to go to and be invested in Jesse B., the survivor. In fact, the executor did turn over the dwelling-house and farm to, and the same was occupied and cultivated by, Jesse B. Haw. Here, then, at the time Jesse B. was put into possession by the executor, he was put into possession of the whole, and there was no allotment or division of the estate to be made by the executor, and there could be no demand by the strictest rule of law of a separate deed by the executor to the administrator or heirs of John, to be by them conveyed to Jesse B., for the will itself had provided for the death of either.

The case of *Ex parte Gadsden*, trustee, 3 Richardson, relied upon by the learned counsel for defendants, was the construction of the powers of a trustee in a deed to make a good title to a lot of land in Charleston. Miss Cappedeville had contracted to buy the lot, provided the trustee was empowered to sell and make her a good title. The question was whether the legal title remained in Gadsden, as trustee, or whether it was executed in the *cestui que trust*. The petition was for the substitution of a trustee. The deed conveyed the lot of land to the trustee, in trust, "to raise annually thereout and therefrom the sum of eight hundred dollars," &c., and after the death of grantor to suffer Elizabeth Pepin, her present and future issue by her husband, to hold and enjoy the said premises, &c., or "in trust to sell the same," &c., "to have and to hold the said lot of land to the trustee, his heirs and

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assigns, forever, upon the trusts," &c. The donor, Collas, and Pepin, husband of Mrs. Pepin, died since the making of the deed, but Mrs. Pepin and several children were living.

The chancellor determined that the legal estate was still in the trustee, and that he was the proper person to make title, and that his deed of conveyance to the lot would be good and convey a sufficient title, and the court of appeals confirmed the decree.

We see no reason to disagree with the decree in that case. The trust in that case was a continuing one. The deed contemplated that the trust should continue, and the court determined that the fee was executed in the trustee, and remained in him for the purposes of the trust.

In the case before us the devise is to the executor, his heirs, assigns, &c., for a term of years, for a specific purpose, with a direct devise of the legal estate to the two sons or to the survivor.

No doubt can rest upon the mind after an examination of the two cases, the one before us and the case of *Ex parte Gadsden*, that the intention of the donor was that the whole legal estate should remain in the trustee for the benefit of wife and children during her life, at least, and that the intention of the deviser was that when the youngest son should arrive at twenty-one years of age the control of the executor should cease, and the legal estate should vest in the son. The events happened as provided for, and the executor carried out the intention of the testatrix, and surrendered the estate to the legal owner; and the law, we think, recognizes the same, and the court of equity will give effect to the claim as existing both in law and equity.

The cases cited by the court in *Ex parte Gadsden*, each and all, maintain the doctrine that where apt words are used in the instrument the courts will construe the power so that it will be enlarged or circumscribed as will carry out the evident intentions of the grantor or deviser. And this rule is nothing but a rule consonant with our ideas of common justice.

The object of conveying a legal estate, which means nothing but the power of control according to law to trustees, may be for a longer or shorter period. In order to convey any

legal estate at all, words must be used suitable for that purpose, and such words as are recognized by the law. But the law recognizes the power of a grantor to limit the estate.

A trust estate is a trust estate, and if a trust estate you can make no other estate out of it. If it be an estate in trust, it may be for a term of years, or for life, or for lives. It may be an estate dependent on an estate certain. Whatever is the character of the trust, it is nevertheless a trust. And when the objects of the trust are accomplished, the trustee's care ceases, and the estate which goes over and beyond the trust goes as a necessary completion of the objects of the grantor, whether deviser or donor.

We have only cited the case relied upon by defendant's counsel, for the reason that that case reviews most of the English decisions bearing directly upon the points involved. And for the same reason we shall cite but one authority relied upon by the learned counsel for plaintiff, *Poor vs. Considine*, 6 Wallace, 458.

The learned judge who delivered the opinion of the court uses the following language, which we think is expressly applicable to the case before us :

“When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee-simple estate be necessary, it will be held to exist, though no words of limitation be found in the instrument by which the title was passed to the trustee and the estate created. On the other hand, it is equally well-settled that, where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.”

The leading authorities on the construction of the extent of the estate which a trustee will take under grants similar to the one before us will be found cited in the opinion in the case of *Poor and Considine*, and we think they fully sustain the claim of complainant to a decree.

COLTMAN ET AL. vs. MOORE ET AL.

EQUITY.—No. 3122.

- I. In the interpretation of a will, the general purpose of the testator is to prevail.
- II. Where all the purposes and conditions of a trust created by a will and codicil are exhausted, equity will distribute the estate among the devisees who are also next of kin, although the period for the expiration of the trust has not arrived.
- III. The court will not extend the trust further than is necessary to support those of its purposes which are valid in law.

STATEMENT OF THE CASE.

The bill of complaint in this cause was filed to procure construction of the last will and testament of Charles L. Coltman, deceased, and for partition of certain real estate devised by said testator. The will of the decedent, after bequeathing to his wife for her life certain personal property and a house and two lots, devises all the rest of his real estate in the city of Washington to Robert Coltman, son of the testator, and his heirs, in trust, to hold the same for the period of twenty years after the testator's death, and during that period to receive and collect the rents and profits, and apply the same, first to an annuity of \$900 to the testator's widow during her life-time, and secondly to divide the residue of such rents and profits equally between said trustee and his three sisters, (these four being the testator's only children;) conferring power on the trustee to lease any and all of the *vacant* lots belonging to the testator's estate, and within said term of twenty years to sell and convey any of said vacant lots if he should think such sale advantageous to the estate, in which event he should hold and invest the proceeds upon the same trust as set forth in regard to the lots. At the expiration of said term the testator directs his said son Robert to sell, or divide in specie, all his said real estate, reserving sufficient to support the annuity aforesaid, and to pay over the proceeds to himself and his three sisters

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equally; and in the event of the death, before settlement and division of the estate, of any of the children of the testator, leaving issue, it is provided that such issue shall in all cases represent and take the share of the deceased parent. In the event of none of said children and no issue or legal descendant of any of them being alive at the expiration of said term of twenty years, all the testator's real and personal estate is devised to the mayor, board of aldermen and common council, of the city of Washington, to establish and endow a house of refuge for destitute and reputable females. The will, at its conclusion, nominates Robert Coltman, aforesaid, as the sole executor. By a codicil to the will, the annuity to the testator's widow is increased to \$1,400, and a further annuity to be paid out of the rents of the property is provided for the testator's daughter, Rebecca, until she shall be eighteen years old, which age she is now past. In this codicil James Adams is nominated "co-executor and trustee" with Robert Coltman, "they jointly and the survivor of them, and the heirs of the survivor of them, to have and exercise the same powers and authority and duties" as to the estate as are specified in said will.

Robert Coltman and Adams qualified as executors, but the latter alone assumed the trust under the will. After a time Adams resigned, the trusteeship, and by decree of the court Charles Bradley was substituted in his stead. Bradley also resigned, and no successor to him has been appointed. The unimproved real estate was sold by the trustee for the time being, and its proceeds invested; such investment being at this time sufficient to secure the annuities above mentioned. It is averred in the bill, and not denied in the answers, that the estate yields a revenue very insufficient as compared with the value of the property, much of the revenue being consumed by heavy expenses of the trusteeship and cumbrous and complicated management. It is also maintained in the bill, and not controverted in the answers, that the executory devise to the mayor, aldermen, and common council of Washington is void. The bill asks, among other things, that the fee-simple to the real estate may be adjudged to be in Coltman's four children; that the executory devise to the corporation of Washington may be declared void; that reference

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be made to the auditor for ascertainment of the personal estate in the hands of the trustee and the quality and value of the real estate unsold, and that partition be made of said realty. The complainants are the widow of the testator, Robert Coltman, two of his sisters, namely, Mary F. Smith and Rebecca Coltman, and Charles T. Smith, the husband of Mary F. The defendants are the testator's remaining daughter, Sarah B. Moore, and her husband, John W. Moore, Charles Bradley, trustee, as aforesaid, and the District of Columbia, as the successor, for certain political and municipal purposes, of the mayor, board of aldermen and common council. A decree *pro confesso* was taken against Bradley. The District of Columbia answered the bill, admitting its averments, and submitting to the court whether the facts thus stated will justify the conclusions of law sought to be established by the complainants. The answer of John W. and Sarah B. Moore objects to the sale of the property before expiration of the term aforesaid.

The cause was certified to the general term for hearing in the first instance.

William F. Mattingly and *E. L. Stanton* for complainants.

Their brief is too lengthy and elaborate for insertion, and is so condensed as not to admit of an abstract.

R. P. Jackson for defendant, Moore.

William A. Cook for District of Columbia.

Mr. Justice MACARTHUR delivered the opinion of the court:

The general intention of the testator in the interpretation of his will is to prevail, even if it becomes necessary to disregard some of the special details for carrying it into execution. In the present instance the obvious design of the deceased was that his entire estate should go to the enjoyment of his four children and their issue, and the property is to take no other direction until said children and their legal descendants shall become wholly extinct. It is only in that

event happening at the expiration of twenty years after his death that the devise over to the city of Washington is to take effect. The purpose of the decedent is equally clear in creating the trust estate. It was necessary in order to support the two annuities and the executory devise to the mayor and common council of the city of Washington. The trustees by the will and codicil were authorized to dispose of the unimproved real estate if they saw fit, and to re-invest the proceeds for the benefit of the estate, and upon the same trusts as the other property. These are undoubtedly the general purposes for which the trust is created, and the case shows that they have all been executed conformably to the wishes of the testator as far as they are legal and valid. The only object of the trust that has not been exhausted is the limitation over to the city.

It is now well settled that there is no objection in law to a municipal corporation taking a devise of real and personal estate for a charitable use. "When the corporation has a legal capacity to take real and personal estate, then it may take and hold it upon trust in the same manner and to the same extent as a private person may do." *Vidal vs. Girard*, 2 How., 127. The statutes of Henry VIII respecting wills, and which declare that corporations shall not take by devise, have never been in operation in the State of Maryland, from which we largely derive our statute law, or adopted into the law of this District, so that the validity of the devise is not affected thereby. It may well be questioned whether the devise now under consideration would be good as a charitable gift, within the meaning of 43 Eliz., even if it were made to an individual. It has, however, been adjudicated in the State just mentioned that this statute has never been in force there, and consequently has never been in force in the District of Columbia. *Dashill vs. Attorney-General*, 5 H. & J., 392; *Same vs. Same*, 6 H. & J., 1; *Wilderman vs. City of Baltimore*, 8 Maryland, 551. And the same authorities conclusively show that a devise like the one in this case is too vague and indefinite to be enforced; and it cannot be supported as a charitable devise by any aid to be derived from the statute last referred to. A practice is, however, recognized in chancery to construe charitable gifts and to

administer them upon principles analogous to its provision. *Whitman vs. Lex*, 17 Serg. & Rawle, 88. And this doctrine has been sanctioned and acted upon by the Supreme Court of the United States. *Vidal vs. Girard, supra*; *Perin et al. vs. Carey et al.*, 24 How., 465. But it must be conceded in this case that it can derive no aid from this conservative rule, for here the trust is too vague and uncertain to be carried into effect whether chancery has jurisdiction under the statute, or upon some principle of practice analogous to that contained in its provisions. It is not competent to compel either individuals or corporations to execute a trust of this character, which is not sufficiently defined in the instrument creating it. The testator makes the devise to the city "to establish and endow a house of refuge for destitute reputable females." This is too vague. No means are suggested by which they can by possibility be ascertained. The locality is not stated from which the objects of this bounty are to be selected, whether from the city or District, or from a particular State, or from all the States, or from the world at large; nor is any method pointed out by which to establish the right of destitute reputable females to that designation. The devise to the city as well as the annuities are out of the way, and all the unimproved real estate has been disposed of, so that all the objects of the trust appear to have been accomplished as far as they legally can be, although the period for its termination has not yet arrived. The only lawful purpose for which it can now be permitted to remain is to postpone the division of the property until the expiration of the twenty years. But we have just seen that the objects for which this term is ordained are wholly exhausted, and the court will not extend the trust further than is necessary to support those of its purposes which are valid in law. Nothing remains now but a naked authority to be exercised by the trustee to collect the rents and profits of the improved estate and to distribute the surplus thereof that may remain, after deducting commissions and expenses, among those who would receive it without such intervention, as the next of kin and heirs at law of the deceased. It may well be inferred that he had no intention that the trust should ever be used to carry out such an unprofitable pur-

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pose. By this contrivance the estate at present yields a revenue wholly inadequate to its value, and much of this revenue is consumed by incidental expenses. The devisees are also the heirs at law, and it is manifestly for their interest that this cumbrous method of managing the property should be terminated if the law will permit it. As the objects of the limitation are exhausted or incapable of execution, an opportunity is thereby afforded of accelerating the general purpose of the deceased to invest his children, who are all of age, with the full enjoyment of his estate. There is no other devise or different direction of the inheritance, and there is no intervening interest to be disturbed by the present division of the estate. This construction goes to confirm the title of the heirs at law, and each will take precisely the same estate which is devised in the will, and which each would be entitled to if there was no will in existence.

For these reasons we are of opinion that the prayer of the bill in this respect should be allowed and the estate distributed without further postponement.

**ALEXANDRIA RAILROAD COMPANY vs. NATIONAL
JUNCTION RAILROAD COMPANY.**

AT LAW.—No. 9723.

A declaration alleging that the defendant by a written agreement was to deliver \$100,000 in bonds to the plaintiff on or before a specified day, upon condition that plaintiff should deliver to defendant a bond in the same amount, without also averring that plaintiff executed its bond and tendered it, is bad on demurrer. An allegation that plaintiff was ready and willing to execute such bond is not sufficient.

STATEMENT OF THE CASE.

The declaration alleges that on October 11, 1869, a preliminary and provisional agreement was entered into and signed by proper parties representing the plaintiff and defendant, the terms of which are stated at some length. It is then alleged that the two companies on January 28, 1870, executed and mutually delivered their contract in writing, which stipulated, among other things, that the defendant, in consideration of the undertaking of the plaintiff, agreed to deliver to said plaintiff \$100,000 of its indorsed bonds on or before July 1, 1870, upon the condition that before the said delivery the plaintiff should execute and deliver to the defendant, with sufficient sureties, its bond in the sum of \$100,000, conditioned that it would construct a bridge and railroad thereon to cross the Potomac River within a time mentioned in the agreement. The declaration then goes on to allege that on the 1st of July, 1870, the plaintiff, at the office of the defendant, demanded the said \$100,000 of bonds, and then and there offered to execute its bond with surety as provided in the contract; that the defendant asked sixty days' time within which to comply with the demand; to which the plaintiff assented, and has all times been *ready and willing* to execute its said bond with surety, and that the said defendant has wholly neglected and refused, &c.

The defendant demurred to the declaration on the ground that the plaintiff had not distinctly averred a sufficient per-

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formance of plaintiff's part of the agreement. There was a joinder, and the demurrer was certified to the general term, to be heard in the first instance.

E. L. Stanton and *A. S. Worthington*, for the demurrer, argued that--

As to the delivery by the Junction company of \$100,000 in its indorsed bonds, it was under that contract a condition precedent, obligatory upon the Alexandria company, that the latter should first not only proceed with its work under that agreement, but also should first execute and deliver its own bond for \$100,000, with sufficient surety, conditioned for the completion of its railroad and bridge within the time stipulated. It was the plaintiff's duty to perform its part so far as it could. It was of the essence of the contract that the Junction company should not trust to the mere *promise* of the Alexandria company. Before delivery of its guaranteed bonds, the former had a right to the formal *possession* of an adequate security in the bond of the Alexandria company with sufficient sureties upon it. The request for sixty days' time did not release the Alexandria company from performance of this condition precedent, and no such averment is made. Besides, to be valid, such release must have been under seal. At the end of the sixty days the plaintiff did not call upon defendant for the Junction company's bonds, nor did it tender its own bond with sureties, or even offer to execute such bond. The declaration, therefore, is bad, because it avers neither performance by the plaintiff of its precedent obligation, nor release by the defendant therefrom. *Holdipp vs. Otway*, 2 Williams' Sanders, 106; *Austin vs. Jervoyse*, Hobart, 69; 2 Rolle's Rep., 238; *Roberts vs. Brett*, 11 H. & L. cases, 337; *West vs. Blakway*, 2 Man. & Gr., 729; *Brymer vs. Thames Haven Co.*, 2 Exch., 549.

Riddle contra.

By the COURT:

There is not a sufficient performance on the part of the plaintiff averred in the declaration, and to entitle it to succeed

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it must allege and prove that it actually executed its bond with good and sufficient sureties, and tendered it to the defendant.

The demurrer is sustained and the cause remanded to the circuit with leave to amend the declaration.

In this case Mr. Justice HUMPHREYS and Mr. Justice MACARTHUR did not sit. Chief-Justice CARTER and Mr. Justice WYLIE concurred in the decision, and Mr. Justice OLIN dissented.

WILLIAM FRASER AND ROSA W. S. FRASER, HIS WIFE, vs. LEONARD B. PRATHER, GEO. MILLER, FRANCIS MILLER, JAMES L. CRAMER, EDWARD SHAW, AND JAS. G. JEWELL.

EQUITY.—No. 3063.

- I. Notice by publication to non-resident defendants does not confer jurisdiction over them of itself, but if the subject of the suit be properly lying within the jurisdiction of the court, a decree after such notice would bind such property.
- II. Where a statute requires notice to non-residents to be given by publication, and a judgment or decree is passed affecting the property subject to the jurisdiction of the court without the publication of the required notice, the decree or judgment, though erroneous, is not void, and a purchaser at a sale under such decree or judgment would take a valid title although the judgment might afterward be reversed for its errors in a higher court.
- III. The purchaser at a foreclosure sale acquires no estate in consequence of his bid or the payment of the purchase-money, nor has the trustee appointed by the court to sell the premises any authority to make the purchaser a deed unless the sale is ratified and confirmed by an order of court.
- IV. A foreclosure suit commenced during the life-time of the mortgagor who is non-resident, and notice by publication has been made as required by law, a decree in such suit for the sale of real estate in this jurisdiction cannot be impeached on the ground that the mortgagor was dead at the time the decree was passed.
- V. A mortgagor, or those claiming under him, who delay for a period of eight years before filing a bill to redeem from the purchasers at a foreclosure sale, and where such purchasers, believing in good faith their title to be perfect, have expended many thousands of dollars in permanent improvements upon such property, such mortgagor or those claiming under him will not be permitted to redeem in view of such laches without allowing the value of such improvements; and this will be made a condition of their right to redeem.
- VI. Under the special circumstances of this case, the complainants are required by the court to pay for new and permanent improvements in order to be permitted to redeem.
- VII. A tax-title in defendant which the complainants seek to have removed on the ground that it is a cloud upon their title, is remitted to the circuit to have its validity tried by a jury, and the case is retained until that issue shall be determined.

STATEMENT OF THE CASE.

On the 2d of April, 1861, Benjamin F. Slocum executed a deed of trust to James L. Cramer, conveying lot 5, square 516, in the city of Washington, for the purpose of securing payment of his note of the same date for \$100, with interest, to the order of said James L. Cramer, one year after date.

Slocum was, at that time, a clerk in the Department of the Interior, but the civil war was then imminent, and in a few days after the execution of the deed of trust and note aforesaid he left his situation and returned to the South, of which section he was a native.

The note being overdue and unpaid, Cramer, on the 13th June, 1862, filed his bill in equity against Slocum, setting out that defendant was a non-resident; that he had executed the deed and note aforesaid; that the debt so secured was overdue and unpaid; also setting out the following provision of the deed of trust: "And if default shall be made in the payment of the principal or interest above mentioned, then the said party of the second part, or his assigns, are hereby authorized to sell the premises above granted, *or so much thereof* as will be necessary to satisfy the amount then due with costs and expenses allowed by law." The bill then proceeds to set out that since the power to sell the property could not properly be exercised by the complainant, inasmuch as he was interested, it would be right that some other person not interested should be appointed by the court to make the sale in his stead, under the direction and subject to the ratification of the court.

The bill then prays that defendant should be required to answer its several allegations, and that the premises aforesaid, *or so much thereof as may be necessary*, should be sold for the payment of the complainant's claim and for general relief.

An affidavit stating the non-residence of the defendant was filed with the bill.

The deed of trust contains no words of inheritance to the grantee, but as he was a trustee with power to sell and convey all the estate of the grantor in the property, the interest conveyed must be regarded as commensurate with the

purposes of the trust. Slocum died on the 9th of November, 1862, after the commencement of the suit, and his widow intermarried with her co-complainant in 1866. Publication of notice to the defendant was ordered to be made in the National Intelligencer once in each six successive weeks before the third Monday of October, 1862, in the usual form, requiring the defendant to appear in person, or by solicitor, on or before that day to answer the bill, and show cause, if any he has, why a decree ought not to pass as prayed. The first insertion of the notice was made on the 14th of June, the day after the filing of the bill. Defendant having failed to appear and answer, a decree, pro confesso, was passed on the 14th February, 1863, by which the defendant was adjudged and decreed to pay to the complainant the amount of said debt, interest, and costs, on or before 1st April, 1863, and in default of such payment the property in question to be sold, and a trustee named and appointed for that purpose, with directions as to the manner of making the sale.

In consequence of the resignation of the trust by the trustee so appointed, the court appointed another in his place on the 16th July, 1863—Thomas Scrivener, jr., who accepted the trust and gave bond.

On the 30th day of July, 1863, the whole of the lot in question was sold by the trustee to one George W. Mitchell, for \$941.05. But Mitchell having failed to comply with the terms of sale, the property was again sold by the trustee, on the 17th of August, 1863, to J. Gray Jewell for \$449.13, by whom the purchase was paid partly in cash and partly in bonds for the deferred installments, as required by order of sale.

On the 7th of November, 1863, the report of the trustee was confirmed: "Unless cause to the contrary thereof be shown on or before the first Tuesday of February next, provided a copy of this order be inserted in the Morning Chronicle, a newspaper printed in the city of Washington, once in each of three successive issues before the first day of January next."

Thomas Scrivener, jr., having died in the mean time, on the petition of J. Gray Jewell, the purchaser, a new trustee, Edward Shaw, was appointed in his stead on the 2d March,

1864. This trustee did not file his bond till 28th November, 1864. On the 11th April, 1866, he filed his report, stating that J. Gray Jewell, the purchaser, having paid the whole amount of the purchase-money in full, the trustee had made him a deed for the property; that Cramer, the creditor, had been paid his debt in full; and that, after deducting all costs and charges, there remained on hand \$257.80.

The publication of notice in this case was made in pursuance of the Maryland act of 1795, ch. 88, sec. 1; and the decree, *pro confesso*, was also in accordance with the provisions of that law, which is in these words: "And in case the defendant or defendants shall not so appear, within the time so limited, either the bill, at the discretion of the chancellor, may be taken *pro confesso*, and he shall proceed to decree in the same manner as if the defendant or defendants had admitted by answer the facts in the bill." So, according to this law, the court has authority in such cases to turn a decree *pro confesso* into a decree absolute and final, without the usual postponement to another term, and such was the course of the proceedings in the present cause.

In addition to his claims under these proceedings, Jewell had acquired color of right to the property under a certain *tax-title* sale of the entire lot to satisfy the corporation for taxes due thereon for the year 1861, and amounting to the sum of \$9.41, having been made to him by the collector, on May 22, 1862, for \$10.70, and a deed having been executed to him by the corporation on September 15, 1864.

With these sources of title, Jewell subdivided the original lot into three several parcels in 1866, and conveyed one of such parcels to each of the defendants, Prather, George Miller, and Francis Miller, for an aggregate consideration of \$3,459.73.

It was to redeem the property from the mortgage and such *tax-title* (against which various grounds of avoidance were assigned by the bill) that the present proceedings were instituted.

The grantees of Jewell filed a joint answer in the present suit admitting the execution of the mortgage and the proceedings had thereon, the title of Jewell, and his subsequent conveyances, but denying the remaining allegations of the

bill. The answer also sets up that they purchased in good faith and upon the advice of counsel that the title was good, and that relying upon the soundness of their title they have built houses and made other improvements on their respective pieces or parcels of said lot to the value of many thousands of dollars.

P. Phillips and John Selden for complainants :

The mortgage was of an estate for life only. The reversion was not incumbered. *Sedgwick vs. Laffin*, 10 Allen, 430. The fee descended to the heirs at law. *Laffin vs. Crosby*, 99 Mass., 446. Under Maryland act of assembly, 1785, ch. 72, sec. 5, (Thomp. Dig., 127,) "it was not contemplated that more should be sold than was necessary to extinguish the debt on the mortgage." *Boteler et al. vs. Brookes*, 7 G. & J., 143-152. The terms of the instrument in question confine the power of sale within the same limits. Before the rights of an individual can be bound by sentence, he must have notice. *The Mary*, 9 Cranch, 144; *The Brig Ann*, Id., 291; *Taylor vs. Carryl*, 20 How., 599. The Maryland acts respecting publication are retained by act Cong., May 3, 1802, sec. 1, (2 Stat., 193; Br. Dig., 234,) but the State legislature "intended by these acts to introduce a remedy in certain cases, for which it had been found to be in all cases beyond the power of the court to provide. The object was to *substitute a personal warning through the newspapers for a personal summons*, in cases where the summons could not be served at all, or without great difficulty." *McKim vs. Odom*, 3 Bland, 429. The order of publication, granted June 13, 1862, was made returnable October 20, 1862. The bill was brought against Slocum, "a citizen of the State of Georgia," as was believed, and publication prayed against him "as a non-resident, as before stated," an affidavit being added from counsel. As under the proclamations of April 15, 1861, (12 Stat., 1258, appx.,) and Aug 16, 1861, (Id., 257,) and the act Cong., July 13, 1861, (Id., 1262, appx.) intercourse with the "*inhabitants*" of insurgent territory had been interdicted, it appeared on the face of the bill that Slocum could neither see nor respond to the order of publication. (See *Dean vs. Nelson*, 10 Wall., 153.)

Slocum was transiently residing in this district, *animo reverendi*. He went South April 10, 1861, and died November 9, 1862. He had no opportunity to return. The people of the two countries were at war. And his particular disposition could not be regarded. *Prize cases*, 2 Black, 687; *Mrs. Alexander's cotton*, 2 Wall., 419; *Coppell vs. Hale*, 7 Id., 554. The decree which passed *pro confesso* bears date February 14, 1863. By it "the defendant is adjudged and decreed to pay to the complainant the said mortgage debt, interest, and costs of this suit, on or before the 1st day of April, 1863, and in default of such payment by the day limited, it is further ordered, adjudged, and decreed that the estate and interest of the defendant, in the proceedings mentioned, be sold. More than three months before, Mr. Slocum had expired. By that event litigation was in proper practice suspended. Story Ep. Pl., § 354, 364; 1 Hoff Ch. Pract., 370; Gilb. For Rom., ch. 9, p. 176. Thus, no proceedings can be had on a decree passed against an executor, as such, after his removal from the trust. *Taylor vs. Savage*, 1 How., 282. An execution cannot be issued and tested after the death of the defendant. *Erwin's Lessee vs. Dundas*, 4 How., 58. Nor judgment of mandamus against one officer enforced against his successor. *The Secretary vs. McGarrahan*, 9 Wall., 298. The principle is applied to mortgages. *Smith vs. Evans*, 1 Dow., 25; *Lane vs. Erskine*, 13 Ill., 501, 503; *Doe vs. McLoskey*, 1 Alabama, 708, 725, 726. (See *Ewald vs. Corbett*, 32 Cal., 493, 499.)

The decree being only against the defendant, who was non-existing at its date, cannot be said to conclude any one. *Matthey vs. Wiseman*, 114 Eng., C. L., 679. If, as in 4 How., p. 71, it be argued that "a purchaser ought not to be bound to know whether a party is dead or not," we repeat what is said by the court, in the same case, at pp. 78, 79. Under any circumstances, Mrs. Slocum (now Mrs. Fraser) never having united in the mortgage, nor been made a party to the suit for sale, is entitled to redeem. *Leonard vs. Villars*, 23 Ill., 377; *Wheeler vs. Morris*, 3 Bosw., 424; *Bell vs. The Mayor*, 10 Paige, 56; *Mills vs. Van Vooris*, 23 Barb., 125.

The nature of her rights is well stated in *Denton vs. Nanny*, 8 Barb., 624, 625. And "the redemption must be of the entire mortgage, and not by parcels. He who redeems

must pay the whole debt, and he will then stand in the place of the party whose interest in the estate he discharges." 4 Kent, 163.

The points in respect to the tax-deed are omitted, as the court referred that matter to a jury-trial. Mr. Phillips filed a separate brief on the legality of selling more land than is necessary to pay the tax due, which is also omitted for the same reason.

Walter S. Cox and I. G. Kimball for defendants.

Mr. Justice WYLIE, after stating the case, delivered the opinion of the court:

There appears one very serious defect in the title of the defendants upon the face of the record, a defect which was not brought to our attention upon the argument.

The decree for sale of the property was passed on the 14th of February, 1863, and after adjudging in favor of the complainants' claim, and requiring its payment on or before the first of April thereafter, in default whereof the property in question should be sold, it appointed the trustee in such default to make the sale, and then proceeded to prescribe the terms and manner of the sale. Among these terms is contained the following: "*And on the ratification of such sale, and on the payment of the whole purchase-money, and not before, the said trustee, by a good and sufficient deed to be executed and acknowledged agreeably to law, shall convey to the purchaser of said property the interest of said defendant therein, free, clear, and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from, or under them.*"

Now, it appears by the record that the sale made by Trustee Scrivener, in this case, has never been confirmed and ratified by the court, and hence, according to the express language of the decree, the trustee who succeeded Scrivener had no authority to make a deed to the purchaser. On 7th of November, 1863, the court ordered that the sale in question should be ratified and confirmed "unless cause to the contrary thereof be shown on or before the first Tuesday of February next; provided a copy of this order be inserted in

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the Morning Chronicle, a newspaper printed in the city of Washington, once in each of three successive weeks before the first day of January next."

Here was an order out of the usual form and course in such cases. It was dated 7th of November, 1863, provided for the publication of notice in each of three successive weeks before the first day of January, and then, should no cause to the contrary be shown, for final ratification, not until the first Tuesday of February, three months from the date of the order.

Without resorting to conjecture as to the reasons which may have had influence on the mind of the court for its caution in making the order in these terms—a caution which the character of the sale, and the absence of the party interested, in a time of war, might well have suggested—the plain fact appears on the face of the record, that no publication of the required notice was ever made in the Morning Chronicle, nor was any application ever made to the court to have the sale in question ratified and confirmed.

Had such application been made it might have been the duty of the court, of its own motion, to refuse to confirm a sale of property which in 1861 had been assessed for taxes at a valuation of nearly \$2,000, where the sale was for \$449.13, payable in currency greatly depreciated, and where the terms of payment were so easy to the purchaser as they were in this case, and where the debt to be paid was only \$100 and interest.

Unless the sale be ratified by the court the purchaser acquires no estate in consequence of his bid, or the payment of the purchase-money, nor has the trustee authority to make him a deed. (See Alexander's Ch. Pr., 146; 2 Daniels's Ch. Pr., 1454.)

Nor does this record show any act whatever on the part of the court which could be construed into ratification of the sale in question, even by implication. It has never so much as passed an order for the distribution of the fund produced by the sale.

It was gross laches, therefore, on the part of these defendants, or their advisers, not to discover an essential defect

such as this, apparent on the very face of their title, and on themselves the law imposes the consequences.

We have thus far assumed that the parties complainant in this case are bound by the decree against the defendant Slocum, notwithstanding he was dead at the time it was passed, and such we consider the law to be. It was not the case of a personal decree, made against a party over whom the court had no jurisdiction; but a decree for the sale of real property, under the jurisdiction of the court, for the payment of a debt due by the ancestor of these complainants, through whom they claim, and which was secured by the lien of a deed of trust upon the property in question.

In *Grignor's Lessee vs. Astor*, 2 How. R., 338, Baldwin J., in opinion for the court says: "In cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land. (S. and R., 432.) They are analogous to proceedings in the admiralty; where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who have an interest in it." We admit that this authority is not directly in point for the present case, except so far as to establish the jurisdiction of the court. Undoubtedly it is erroneous to make a decree against a man after his death, or to dispose of property under such a decree, after it has descended to his heirs, unless they have been made parties to the suit; but such a decree would not be void, for the subject-matter of the decree was within the jurisdiction. Notice by publication in such a case is proper as to non-resident parties, and in most cases is not required by the law. But of itself, no publication to non-residents can confer jurisdiction over them, nor can even personal service of notice through the mail, or by means of an agent, and a decree founded on such a notice would be absolutely void. But if the subject of suit be property lying under the jurisdiction of the court, a decree after such notice would bind the property. It would not be binding personally upon non-residents, but only in respect of their interest in the property. The notice then, of itself, is of none effect on the question of juris-

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diction. If there be no property there is no jurisdiction. It is the subject-matter, then, alone which is the ground of jurisdiction. And where a statute requires notice to non-residents to be given, by publication, and a judgment or decree is passed affecting the property subject to the jurisdiction of the court, without the publication of the required notice, the decree or judgment, though erroneous, is not void; for of itself, notice to non-residents contributes nothing to the court's jurisdiction. A purchaser at a sale under such a decree or judgment would take a valid title, although the decree or judgment might afterwards be reversed for its errors in a higher court, and notwithstanding the errors of the court might be palpable upon the record. (See *Voorhees vs. Bank of United States*, 10 Peters, 449, in addition to *Grignor's Lessee vs. Astor*, already referred to.)

So far, therefore, as this case involves the jurisdiction of the court to make a decree for the sale of the property in question, we are of opinion that such jurisdiction did belong to it; and a purchaser *bona fide*, for value, would have taken a good title. The difficulty with the case of the defendants, in this respect, is that no sale was ever ratified by the court, and the trustee made the deed to the purchaser in disregard of the express restriction of the decree that he should make no deed except after the ratification of the sale by the court.

Nevertheless, we are not disposed, under the circumstances of the case, to allow the complainants to enter into the fruits of other men's labors, or to reap where they have not sown. In 1861, Slocum, their ancestor, was here holding an office under the Government, had purchased the lot in question, and had a clear title to it. He was a native of Mississippi, and a friend of the gentleman at the head of the Interior Department, where he was employed. The lot was at that time assessed for about \$2,000. He mortgaged it for a loan of \$100, to enable him to reach his friends, and left the District, after the civil war had in fact broken out in that part of the country "where he would be." He died during the war; the debt for which he had given security upon his lot was overdue and not paid. It was not known whether he was living or dead, or, if dead, who were his heirs; nor was it lawful or practicable to ascertain these facts. Nor was it

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possible to foresee the duration of the war, or its effect upon property in this District. A bill was filed by the creditor, Mr. Cramer, with a view to enforce his lien, by procuring a judicial sale of the property for the satisfaction of his claim. The usual notice by publication was given to Slocum, as a non-resident, and in due time a decree by default was entered directing a sale of the property and making appointment of a trustee for that purpose. This trustee (or his duly-appointed successor) did make a sale of the property to J. Gray Jewell; and on payment of the whole of the purchase-money, made him a deed for it. The price paid by Jewell was very inadequate, but he thought, no doubt, that he was getting a valid title, at a low price. Shaw, the trustee, made his deed to Jewell, in pursuance of the sale, November 24, 1864; consideration, \$449.13. Jewell divided the lot into three parts; one he sold to Prather on the 6th January, 1866, for \$1,194.13; one other to Francis Miller, 12th of same month and year, for \$1,147.80; and the other part to George Miller, January 2, 1866, \$1,147.80; in all, \$3,489.73. The deeds made to these purchasers contain covenants of general warranty, and their aggregate amount of purchase-money is \$3,489.73. At the time of these purchases the lot was wholly unimproved. Before making their respective purchases from Jewell, each of these defendants, George Miller, Francis Miller, and Leonard B. Prather, had the title examined by counsel, generally reputed to be competent, and they were advised that the title was valid. One of these gentlemen enjoys a very high reputation as an examiner of titles in this District. He expressed the opinion that, being a title under a chancery decree, it was good. Houses have been built, and other improvements made by these purchasers on their respective subdivisions of the lot in question, to the value of many thousands of dollars, expended by them in good faith, and in reliance upon the judgment of well-known experts on questions of title. Besides this, the war closed in the spring of 1865, and thereafter there was no obstruction to delay the plaintiffs from immediately looking after their interests in this District. At that time Jewell, the purchaser, claimed the title under the sale, but had expended nothing in improvements, and had paid but \$449.13 for the property; \$257.80 was yet in the hands of the trustee, where it still is; and this was the state of mat-

ters till early in January, 1866, when Jewell sold to the two Millers and to Prather their several parts of the lot. Had these parties made their appearance within six or even eight months after the close of the war, and made proper application to the court, the sale would have been instantly set aside, without loss or injury and but small inconvenience to any party. This laches on their part continued till the bill was filed in the present suit, which was in January, 1873, nearly eight years after the war had closed, these purchasers all the time expending their money and increasing their improvements, believing themselves secure, because a lawyer had told them it was a good chancery title.

To permit complainants to redeem under these circumstances, without allowing for the improvements, would be to aid them, in spite of their own laches, to commit a fraud upon men who had expended their money in good faith, under a title which counsel learned in the law had advised them was good, and which to the unlearned seemed to be good. Fortunately for the justice of the case, the court, having been invoked for its assistance, is at liberty to extend its assistance upon such terms as will do no injustice. Under no circumstances will a court of equity allow itself to be made an instrument of wrong. Rather than lend itself to such a cause it will refuse to interfere, and leave the parties to their remedy at law; and if that would result in a fraud upon the defendant, it will interpose on his behalf.

Although a mortgagee is not entitled generally to any allowance for his improvements, (*Moore vs. Cable*, 1 Johns. Ob. R., 385,) yet such allowance may be made under special circumstances, as when the mortgagee has acted in good faith, and under a mistaken impression that the right of redemption has been finally barred, as was held in *Benedict vs. Gilman*, 4 Paige's R., 58, and *Westmore vs. Roberts*, 10 How. Pr. R., 51; or when the mortgagor has been slow to act, if not guilty of laches, and has thus led to a false impression by his silence, although he may have been ignorant of the circumstances which would have made it his duty to speak. (*Mickle vs. Dillaye*.) In commenting on the case of *Moore vs. Cable*, Chancellor Kent says, "Lasting improvements in building have been allowed in England under peculiar circumstances, and they have been sometimes

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allowed in this country and sometimes disallowed," (4 Com. 167;) and in a note at the same place it is further said that "all the cases agree that the mortgagee is to be allowed the expense of repairs, and beyond that the rule is not inflexible, but it is subject to the discretion of the court, regulated by the justice and equity arising out of the particular circumstances of each case." In Hilliard on Mortgages the author says, "The rule refusing the allowance of lasting improvements has been subjected to some exceptions in special cases, as where the mortgagee makes such improvements supposing himself to be the absolute owner;" and in *Neal vs. Hythorp*, 3 Bland Ch. R., 590, the chancellor says, "If the mortgagee have been long in possession, claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them."

On the like principle of justice is grounded the doctrine that where the mortgagor subsequently borrows more money from the mortgagee on bond, and dies, the heir shall not redeem without paying both debts.

We are of opinion that, in cases like the present, the pendency of the war could not affect the rights of a *bona-fide* purchaser at a judicial sale, especially when the record does not disclose the status of the mortgagor to be that of a public enemy; since, as we have seen, the sale would be valid if the court had jurisdiction over the matter. But, according to the view we take of the case, it has become unnecessary to go into that question at all.

As to the tax-title in the defendants, and which the complainants seek to have removed on the ground that it is a cloud upon their title, we feel obliged to remit that controversy to be tried by jury at the circuit. The irregularities set out in complainants' bill, showing a neglect or violation of certain provisions contained in the ordinances of the corporation by its officers, as to the time and mode of making out the assessment-lists, making entries in the book, &c., are not of the kind to affect the validity of such a sale. A tax-sale is good if it corresponds exactly, in all particulars, with the act of Congress on the subject, although the officers may have neglected to fulfill certain requirements in regard thereto prescribed by ordinances of the corporation. That

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was determined by the Supreme Court in the case of *Thompson vs. Lessee of Carroll*, 22 How., 422.

On the other hand, the record furnishes no evidence to enable us to determine on behalf of the defendants that their tax-title is a good one. A tax-deed of itself is no evidence of title. It is absolutely waste paper until the holder under it has shown that all the preliminary steps required by law have been strictly complied with. "The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed that the facts it professes to set out had any existence." Blackwell on Tax T., 430.

In the present case we have before us no evidence to show that the tax-deed in question is either good or bad.

Should that tax-title, however, be a valid one, it will put an end to present controversy. It is true that defendants have filed no cross-bill in this cause, setting up a title under the tax-deed to Jewell, although in their answers to the allegations of the bill which avers that it is void they do insist that it is a valid title and one under which they claim.

It would be useless, considering this aspect of the controversy, to pass a decree allowing the complainants to redeem on the terms we have indicated, for if they were to redeem by paying defendants for their improvements, leaving open the controversy under the tax-sale, they might in the end lose all should it turn out that the defendants had a valid title under that sale.

It will be necessary, therefore, to retain the cause for the present, and until an issue can be made up and tried at law whether that tax-title be valid or otherwise; and in that issue the defendants here should be the plaintiffs, as on them it will lie to make out the affirmative.

Should the result prove favorable to the defendants in this cause, the bill in the present case will have to be dismissed. Should it be otherwise the redemption sought for by the complainants in this cause can be obtained on the terms we have already indicated.

Mr. Justice MACARTHUR did not sit in this case, and Mr. Justice OLIN did not take part in the decision.

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notice of dissolution, in which T. G. Korony's name was mentioned, but not as a partner. Mr. Korony then claimed to be a partner, and made application to court. The counsel for all the parties agreed, as a matter of compromise, that a new notice should be published, embracing Mr. Korony's name as a partner; Mr. K., on his part, agreeing at once to assign to the firm, or to Mr. Snyder, all his right, title, and interest in the firm."

And thereupon the defendant's counsel prayed the court to instruct the jury that, if they found from the evidence that T. G. Korony was a member of the firm from which the defendant ordered these goods, the plaintiffs cannot recover in this action; but the court held and instructed the jury that if they found that this debt was due to the plaintiffs, they must find for the plaintiffs; whereupon the counsel for the defendant made his exceptions to the refusal of the court to instruct the jury as prayed, and to the instructions of the court as given.

The jury having found the issue for the plaintiffs, the defendants bring the cause to this court upon a bill of exceptions.

————— for the plaintiff.

Bainbridge H. Webb, for defendant, contended that the court below erred—

1. In refusing to give the instruction asked for by defendant's counsel, to wit: That if the jury believe from the evidence that T. G. Korony was a member of the firm from which these goods, the plaintiffs cannot

recover.
It contains too many defendants, or *too few* plaintiffs, a material defect. 1 Chitty Plead., 31; Arch. v. Jackson, 10 C. C. R., 26, 27.

The court, in instructing the jury that if they believed from the evidence that this debt was due to plaintiffs, they must find for the plaintiffs.

This instruction, if given at all, should have been with the

qualification that the debt must have been due *originally* to plaintiffs.

If the debt was due the plaintiffs as *assignees* (and the evidence tends strongly to show that fact) they could not sue for it in their own name.

Mr. Justice WYLIE delivered the opinion of the court:

' This was an action of *assumpsit*, in which the defendant pleaded the general issue.

At the trial the defendant gave evidence tending to show that one T. G. Korony was a member of the plaintiffs' firm at the date of the contract. Plaintiffs gave evidence on the other side tending to show that said Korony was not a member of the firm at that time, but that Snyder and D'Estrada were the only persons who then composed that partnership. There was a conflict of testimony over that question.

Defendant's counsel then ask the court to instruct the jury that if they found from the evidence that T. G. Korony was a member of the firm from which the defendants ordered the goods, the plaintiffs cannot recover in this action.

To this prayer the court answered, and "instructed the jury that if they found that this debt was due to the plaintiffs they must find for the plaintiffs." Defendants thereupon excepted to the instruction so given.

We think the instruction given was no answer to the prayer. The prayer presented a question of law, proper for the decision of the court. The answer of the court left the decision to the jury, which was error. For in actions *ex contractu* if it be shown at the trial that all the parties to the contract have not joined in the action of plaintiffs, the defendant may take advantage of the omission either by plea in abatement or as ground of nonsuit at the trial. 1 Chitty's Pl., 13.

Judgment reversed and a new trial granted.

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No. 9812.

- I. Where promissory notes are delivered by the makers in payment of an antecedent debt, it is not competent to prove by parol that the party to whom they were so delivered agreed to pay the same as they should respectively come to maturity.
- II. The principle is affirmed that parol evidence will not be received to vary or contradict a written contract.
- III. If a person takes a negotiable instrument for a valuable consideration before the same is due, and without notice of any equities existing between the original parties, his title is good; and in order to impeach that title, it must be proved that he had notice or knowledge of the facts constituting such equities at the time he obtained possession of the instrument.
- IV. A party who seeks to avail himself of a collateral compromise agreement, by the terms of which the original contract is to be delivered up upon certain specified payments being made, must show that he has fulfilled the compromise in this respect, in order to defeat a remedy on such original contract.

STATEMENT OF THE CASE.

This action is brought upon five promissory notes, each for the sum of \$2,267.38, made on January 8, 1872, by S. P. Brown & Son, payable to the order of Austin P. Brown, esq., in one, two, three, four, and five months, respectively, after their date. On the same date they were indorsed by the payee to the Philadelphia Coal Company, and were afterwards and before their maturity transferred by said company to the plaintiff.

At the trial the plaintiff proved the signatures and indorsement on said notes, and offered them in evidence. They also proved that the defendants, Samuel P. Brown and Austin P. Brown, composed the firm of S. P. Brown & Son, and there rested the case.

The defendants then introduced evidence tending to show that for several years before the date of said notes there had been large and extended dealings between them and the said Philadelphia Coal Company, and that there arose a contro-

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versy as to the amount of the indebtedness of the defendants to the said coal company, and that on the day of the date of said notes the defendants and Henry L. Cake, president of said company, conferred in respect to said controversy, and they executed and delivered the notes aforesaid to said Cake, and at the same time said Cake signed and delivered to the defendants a paper, of which the following is a copy :

“WASHINGTON, D. C.,
January 8, 1872.

Received from S. P. Brown & Son the following notes in full settlement of their indebtedness to the Philadelphia Coal Company :

One note, dated January 8, 1872, at one month...	\$2, 267 33
One note, dated January 8, 1872, at two months..	2, 267 33
One note, dated January 8, 1872, at three months	2, 267 33
One note, dated January 8, 1872, at four months..	2, 267 33
One note, dated January 8, 1872, at five months..	2, 267 33
One note, dated January 8, 1872, at six months..	2, 267 33
Amounting to.....	13, 603 98

And in settlement of these notes I have agreed, upon behalf of the Philadelphia Coal Company, to receive an order on Edwin Stewart, paymaster of the United States Navy, and accepted by him, for five thousand five hundred dollars, (\$5,500,) with interest from date, said order to be liquidated as follows: Two thousand dollars at three months from December 20, 1871; two thousand dollars at four months from December 20, 1871; and fifteen hundred dollars at five months from December 20, 1871—the whole amount with interest from December 20, 1871. Also Z. Jones's indorsement on four notes, as follows: S. P. Brown & Son's notes, to order on Z. Jones, dated January 8, 1872, for twelve hundred and fifty dollars, respectively, at six, eight, ten, and twelve months, amounting to five thousand dollars—this sum of ten thousand five hundred dollars (\$10,500) being in effect a compromise of the said indebtedness of \$13,603.98, to be conclusive upon the payments being made at the times stated. And I further stipulate, on behalf of the Philadelphia Coal Company, that upon payment of the \$5,500, with interest, by the

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paymaster, within the time stated, the first, second, and third notes given by S. P. Brown & Son for the sum of \$2,267.33, amounting to \$6,801.99, shall be returned to S. P. Brown & Son as settled; and upon payment of the four notes at maturity indorsed by Z. Jones, the remaining three notes of S. P. Brown & Son, amounting to \$6,801.97, shall be handed back to S. P. Brown & Son, being settled in full by the payment of said four notes indorsed by Z. Jones.

H. L. CAKE,

President Philadelphia Coal Company.

Witness: A. B. WOLFE."

The defendants also introduced evidence tending to show that when the company transferred the possession of the notes now in suit to the plaintiffs, the said company received in consideration therefor the promissory notes of said Spofford and Clark to precisely the same amount, and that no other consideration passed therefor; and that said Spofford and Clark acted for said coal company in selling their coal on commission, and sometimes purchased coal on their own account from said company. And at the time of such transfer of the notes in suit to said plaintiff, said Cake assured them that they should incur no loss in respect of said transaction, and that he would indemnify and protect them against any such loss.

The defendants then offered proof that at the time the said writing signed by H. L. Cake, as president of said company, was delivered to the defendants, and on the same day, after the same had been signed and delivered, it was agreed by and between said parties that as the said notes should respectively mature, the same should be taken up and paid by said company; but the court excluded said evidence, and this ruling is embodied in the first two bills of exceptions.

The plaintiffs introduced evidence tending to prove that the reasons why the coal company sold the notes to Spofford and Clark and took their paper in return, was that Spofford and Clark were in good credit and the company could negotiate their notes and raise money on them, but could not do this on the notes of the defendants; and that the company was then greatly in need of funds, and that the notes were obtained from defendants for the purpose of enabling the

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company to obtain money upon them ; and that no part of the agreement had been fulfilled by them, and that if they had made the payments stipulated for in said agreement, defendants' notes would have been taken up and delivered to them. There was no testimony in the case that Spofford and Clark had actual notice of the written agreement given by Cake to the defendants.

The notes now in suit and the Jones notes mentioned in the compromise agreement were delivered at the same time to said Cake, as was also an acceptance of Paymaster Stewart by which he promised that whenever certain vouchers were received at his office payable to S. P. Brown he would pay out of them to said coal company the sum of \$5,500, in the installments called for by said agreement. No portion of said installments were ever paid to said company, and the vouchers referred to were never received at the paymaster's office, nor has anything ever been paid on the Jones notes mentioned in the said agreement.

At the conclusion of the testimony the counsel for defendants asked the court to instruct the jury as follows :

If the jury believe that the plaintiffs came into possession of the notes sued on without paying actual valuable consideration, or by paying only nominal consideration, or under circumstances which would have put a prudent man on inquiry concerning any agreement between the defendants and the Philadelphia Coal Company with respect to said notes, then the jury must consider the plaintiffs to be bound by such agreement. And under the agreement of January 8, 1872, in evidence, the Philadelphia Coal Company was bound, among other things, to take up and hold those two of the notes sued on which first became due, and if the jury find from the evidence that they did not do so, but allowed them to go to protest, then the verdict of the jury should be for the defendants.

But the court refused to give said instructions, to which ruling the defendants excepted, and the court did instruct the jury that if said notes were before maturity indorsed for a valuable consideration by the said coal company to the plaintiffs, then the plaintiffs were entitled to recover the full amount of said notes from defendants, and the said agree-

ment between said company and defendants would not affect the rights of plaintiffs unless they had actual notice of said agreement before their purchase of said notes, and if the jury should find that plaintiffs had actual notice of such agreement, and should further find that it was not carried out by the defendants, the plaintiffs would be entitled to a verdict; and further that if the jury should find that the notes in suit were indorsed and delivered to plaintiffs before their maturity, and in the course of business, they are entitled to recover the face of them. And that they are not affected by any transactions between the original parties of which they had no notice when they received the paper.

To all of which the defendants took several bills of exception, upon which the case now comes to the general term.

Joseph Casey and *R. Ross Perry*, for plaintiffs, argued in their printed brief that—

The notes given by the defendants to the coal company were contracts in writing by which Brown & Son engaged to pay the sums named in them respectively. The evidence excluded by the court was parol evidence to contradict and vary these writings by showing that the coal company was to pay them and not Brown & Son, as the written notes stipulated. This was a direct infraction of the rule that excludes parol evidence to vary and contradict a written contract. (1 Green Ev., § 281, and notes; Starkie on Ev., pp. 660, 661. See also the case of *Allen vs. Furbish*, 4 Gray R., p. 504.)

As to the instruction asked for by defendants, there were in the first place no facts proved to justify the court in giving it. In the second place, there was nothing in the written agreement which would have justified the judge in giving to it the construction asked, to wit: that by its terms the Pennsylvania Coal Company was bound to take up and pay the notes as they matured.

The point here raised in the instruction asked for, had been definitely and finally settled by the Supreme Court of the United States in *Swift vs. Tyson*, 16 Pet., 1; and espe-

cially by the later case of *Goodman vs. Simonds*, 20 How., 343.

The exceptions to the instructions in the charge of the court all raise the same question, to wit :

That irrespective of the negotiable character of the paper, and that whether the original payees or their indorsees were the holders or owners of the notes, or the plaintiffs in the action, the agreement of compromise was unavailable as a defense in the case.

It was so because the defendant had failed to perform it, or to tender performance even at the trial. The notes were to be delivered up to the defendants upon payment at the times and in the manner set forth in the agreement. In this they had utterly failed. The payments through Stewart were to be made respectively on the 20th March, April, and May, 1872. Not a farthing was ever placed in his hands to meet this engagement. Not one movement, or effort, or offer to meet and fulfill this agreement of compromise in any respect, then or now. Nor any payment or offer to pay the Jones notes. It is, therefore, little less than absurd and preposterous to set up an offer or agreement of compromise which has not been availed of, accepted, or performed by the defendants.

The facts of whether the notes were indorsed and delivered to the plaintiffs before maturity, whether this was in the course of commercial business, and whether it was without notice of any collateral agreements between the original parties, were all submitted to the jury, and they were all found in favor of the plaintiffs. That being so, cut up the defendants' case by the roots. It took away the foundation of their defense, and left them not an atom of ground upon which to stand.

E. L. Stanton and *A. S. Worthington* for defendants. The following points are from their brief :

1. The court erred in excluding evidence that at the time the writing above alluded to was signed and delivered to the defendants, and also after such signing and delivery, it was agreed

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between the company and the defendants that as the notes sued on should respectively mature, the same should be paid and taken up by the company. The testimony offered does not come within the rule that a written contract is not allowed to be varied by a verbal agreement made before or at the time of the written contract. Brown & Son were not required to pay, as they matured, both sets of securities—namely, on the one hand their own notes, indorsed by Austin P. Brown, and on the other hand the installments of the order on the paymaster, and the notes indorsed by Jones. Payment of the latter set of securities was to relieve the defendants from payment of the former set, including the notes now sued on, which were all to be returned to them by the coal company.

The evidence excluded would not have varied the writing, but in respect to payment of the notes as they mature it would have given the only explanation of the writing consistent with the written words. It was, therefore, admissible. (1 Greenleaf on Evidence, sec. 282 *et seq.*)

2. The court erred in holding, in effect, that constructive notice of an agreement between the coal company and the defendants would not affect the right of the plaintiffs.

3. The court erred in holding, in effect, that if the notes were delivered to plaintiffs before maturity, absence of notice *at the time of receipt of notes* would relieve the defendants from being affected by the transactions between the coal company and the defendants, notwithstanding that plaintiffs paid for their notes with their own paper, which paper was taken up by the coal company. "Payment on the note of the buyer is, consequently, not sufficient to defeat a prior equity, unless the instrument is negotiated, and renders the maker liable to a third person." 2 Am. L. Cases, p. 228.

4. The court erred in holding in effect that a compromise or settlement (including determining a sum to be paid and the times for its payment) to which the defendants were parties, could only be made available by them by proving that they had conformed to all the stipulations, notwithstanding antecedent violations of the agreement by the other party to the contract, which put the defendant in peril of having to pay more than twice the sum fixed upon.

Mr. Justice MACARTHUR delivered the opinion of the court:

As to the first and second exceptions the court are of opinion, that it is not competent for the defendants to prove by parol that at the time they delivered the notes in suit to the Philadelphia Coal Company, there was an agreement by which the said company should take up and pay said notes as they should respectively come to maturity. Such evidence would have been inadmissible, even if the company had been plaintiffs instead of Spofford and Clark. It is an elementary principle that parol evidence will not be received, to vary or contradict a written contract, nor is there anything in this case to take it out of the operation of the general rule. The parol evidence was therefore properly excluded by the court from the consideration of the jury.

The instruction asked for by the defendant was properly refused. The exception to this ruling raises the question whether the plaintiffs were bound by the agreement of compromise between the defendants and the Philadelphia Coal Company entered into by them at the time the notes in suit were given. It is now settled that if a party takes a negotiable instrument for a valuable consideration, before the same is due, and without notice of any equities existing between the original parties, his title is good, and any defense founded upon those equities cannot operate to defeat his recovery. In order to affect him by such defense it must be shown that he had notice or knowledge of the facts which go to impeach the title, at the time he obtained possession of the paper. *Smith vs. Tyson*, 16 Pet., 1; *Goodman vs. Simonds*, 20 How., 343. Besides, the instruction is open to the objection that it assumes the existence of facts which do not appear in the case.

The coal company was not bound by the agreement to take up said notes which first became due, unless that purpose is to be inferred from their promise to return the said notes to the defendants when the agreement was complied with on their part, which they failed to do. Even if the coal company were bound to take up the notes, that circumstance

would not affect the plaintiffs where they had no notice of such obligation. The instruction was properly rejected.

As to the exceptions to the charge of the court to the jury, the court here are of the opinion that they are not well taken. It is quite clear that the defendants have wholly failed to perform any part of the agreement upon which they rest their defense. The first three of the notes falling due were to be delivered up to defendants only upon the payment of the sum of \$5,500 by Stewart to the company ; but it does not appear that Stewart was ever furnished with the vouchers out of which he promised to make the payments in the manner set out in the agreement. The remaining three notes were to be handed back to the defendants only upon payment of the four notes indorsed by Z. Jones, and it appears that these latter notes have been protested and still remain unpaid ; so that even if the suit had been in the name of the Philadelphia Coal Company the agreement would not have been available as a defense, as there was neither performance nor tender of performance, either before or since the commencement of the action.

We think the rulings of the court entirely right, and the motion for a new trial must be denied and the judgment affirmed.

MARVIN EASTWOOD vs. C. E. CREECY, WILLIAM
J. MURTAGH, AND BENJAMIN M. PLUMB.

AT LAW.—No. 9356.

- I. If a party on cross-examination asks about a matter not stated in the direct examination, this court will not for that reason reverse the judgment when the bill of exceptions does not show the answer of the witness, or that it was improper or unfavorable to the party making the objection.
- II. In an action by the payee of a promissory note against the maker, the latter may be examined as a witness to prove the defense of usury.

STATEMENT OF THE CASE.

This suit was brought against the defendants, doing business under the firm-name and style of C. E. Creecy & Co., to recover upon four certain promissory notes made by them to the plaintiff, aggregating in the sum of \$1,361.10, with interest. To this suit defendants interposed the pleas of *nil debit, usury, and never promised as alleged*. Upon which pleas the plaintiff joined issue, and the case came on for trial at the May circuit term, 1873, of this court, and was submitted to a jury, who, under the instructions of the justice presiding, rendered a verdict for the plaintiff.

Upon the trial of the cause, the plaintiff introduced the defendant B. M. Plumb to prove the signatures of the makers of the notes, as also the names of the persons who constituted the firm of C. E. Creecy & Co.; and the defendants upon cross-examination of this witness inquired as to the consideration given for said notes, whereupon plaintiff's counsel objected, but the court allowed said evidence to be given to the jury, and the plaintiff's counsel made his exceptions to the ruling of the court.

On the part of the defendants the said C. E. Creecy, one of the makers of the notes in suit, was introduced as a witness for the purpose of proving the defense of usury. The counsel of the plaintiff objected to the testimony on the ground that this witness cannot be permitted to impeach the

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paper to which he has put his name, but the objection was overruled and the plaintiff's counsel made his exception thereto.

The act of Congress in force in this District at the date of said notes provided that the rate of interest shall be six per cent. on verbal contracts, but that parties may agree in writing for the rate of ten per cent. per annum, and that in case of usury the interest only shall be forfeited, but the principal sum may be recovered.

The verdict was for the plaintiff for the sum of \$892.00, instead of \$1,361.10, and interest as claimed.

L. G. Hine, for plaintiff, cited as to the first exception, *Railroad Company vs. Stimpson*, 4 Pet., 448, and as to the second exception, *Bank vs. Dunn*, 6 Pet., 51; *Bank vs. Jones*, 8 Pet., 12, 3 How., 73.

F. Trigg and *William Carne* for defendants.

By the COURT:

As to the inquiry put to plaintiff's witness upon his cross-examination by defendants' counsel, we cannot see from the record that the plaintiff was thereby injured. The bill of exceptions does not state what answer the witness made to the inquiry, or whether he answered it at all. It is therefore impossible to say, even if the court erred in holding the question admissible, that any evidence improper or unfavorable to the plaintiff was introduced on the cross-examination objected to. There is no ground in this exception for a reversal.

The principal question in the case is whether the maker of a promissory note can be examined as a witness to prove the defense of usury; and we are of opinion that where the payee sues the maker of such an instrument the latter is a competent witness to prove a failure of consideration, or that the contract was usurious. The general proposition that a party to negotiable papers will not be permitted by his own testimony to impeach it, can only be applied when the action is not between the original parties.

Judgment affirmed.

**JEDEDIAH LATHROP vs. THE UNION PACIFIC
RAILWAY COMPANY.**

IN EQUITY.—No. 1299.

- I. A corporation can have no legal existence out of the boundaries of the sovereignty by which it was created, and can only be sued in a different State by express legislation authorizing such suits against foreign corporations having agents within the State, conducting the business for which it was organized.
- II. For the purpose of litigation, a corporation is to be considered an inhabitant of the State under whose laws it exists.
- III. The act of Congress incorporating the Union Pacific Railroad Company extended the privilege of certain land-grants and other subsidies to the Union Pacific Railroad Company, Eastern Division, upon the same conditions as are imposed on said first-named company, and said act also provided that said first-named company can sue and be sued in all courts of law and equity within the United States. **Held**, that although the Union Pacific Railroad Company, Eastern Division, accepted the aid of the statute, its capacity for suing and being sued was not thereby enlarged, and being a corporation of the State of Kansas, could not be sued in this jurisdiction.

The facts necessary to understand the decision are stated in the opinion of the court.

Walter S. Cox and *Samuel L. Phillips*, for plaintiffs, presented the following points:

It is admitted that a foreign corporation not doing business in a State is not suable in the courts of that State, unless authorized by statute. But the present is not that case. The Leavenworth and Pawnee Railroad, a corporation of the State of Kansas, was authorized to build a certain portion of the Pacific Railroad, (sec. 9, act July 2, 1862,) "upon the same terms and conditions in all respects as are provided for in this act," in regard to the Union Pacific Railroad.

The first section of this act declares that the Union Pacific Railroad "shall be able to sue and be sued, plead and beimpleaded, in all courts of law and equity within the United States."

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The Leavenworth and Pawnee Railroad subsequently became the Union Pacific Railroad, Eastern Division, (the defendant,) and, it is submitted, is therefore suable in this court. 18 How., 404.

James A. Buchanan and Charles J. M. Guinn, for defendants, argued the following points:

The primary question upon the whole pleading is whether this defendant was an inhabitant of the District of Columbia, or capable of being found within said District.

In the case of the *Bank of Augusta vs. Earl*, 13 Peters, 588, the Supreme Court decided "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation, and cannot migrate to another sovereignty."

"The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile, as against those who are compelled to seek them there, and can find them there and nowhere else." *Marshall vs. Baltimore and Ohio Railroad Company*, 16 Howard, 328.

"The legal entity or person which exists by force of law can have no existence beyond the limits of the State, or sovereignty, which brings it into life and endues it with its faculties and powers." *Ohio and Mississippi Railroad Company vs. Wheeler*, 1 Black, S. C. R., 297; *Covington Drawbridge Company vs. Sheppard*, 20 Howard, 233; *Louisville Railroad Company vs. Leston*, 2 Howard, 558.

Now, if a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created, and must dwell in the place of its creation, this defendant cannot, by possibility, be an inhabitant of this District, or be found within this District, unless it can be shown that it has been *incorporated* by a law of Congress operating within this District.

Now, what essential acts are necessarily performed by a

sovereignty before it can be said to give existence to a corporation?

It must authorize such a body to have perpetual succession, to sue and be sued, implead and be impleaded, grant and receive by its corporate name, to have a common seal, to make by-laws, to have the power of motion or removal of members. *Angel & Ames on Corp.*, ed. 1861, sec. 110.

No body of men can be held to be incorporated under the law of any locality unless these attributes are conferred upon the named body by the law of that locality.

Now, in what relation does the defendant stand to this District?

It was not incorporated by the acts of Congress operating within this District, although authorized by such acts to construct its road in the manner and along the route specified therein, for this route was far beyond the bounds of the District of Columbia and the jurisdiction of this court.

Now, it must be perfectly apparent to this court that this defendant cannot hold meetings of its president and directors *outside of the limits within which it was authorized to fulfill its specific objects*. *Angel & Ames on Corp.*, ed. 1861, sec. 104.

Its stockholders and its president and directors outside of such limits can hold no corporate meeting.

It need not, certainly, be repeated that it is impossible that a corporation can be found within the District which is not, as such, capable in law of holding, within the District, a meeting or assemblage of its aggregate parts.

The fact that a corporation carries on business in a different State or District from that in which it is created, and has agents and employes in such other locality, and there makes contracts and conducts its business, does not make it a resident or inhabitant of such other locality. *Blackstone Manufacturing Company vs. Blackstone*, 13 Gray, 488; *Day vs. Newark India-Rubber Company*, 1 Blatchford, O. C. R., 628.

This last case is precisely adverse to the right of the plaintiff to sue the defendant in this court.

It has always been found necessary to provide, by express legislation, for giving jurisdiction, even to *State* courts, having common-law powers, over foreign corporations having agents

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within the State and there exercising some of their franchises.

This is done in Maryland by Art. 75, sections 100 and 101.

Mr. Justice MACARTHUR stated the case, and delivered the opinion of the court :

This case is brought here by an appeal from a decree made at an equity term sustaining a plea to the jurisdiction. In the bill of complaint it is alleged that the name of the Leavenworth, Pawnee and Western Railroad Company was changed by a law of the State of Kansas, (where it was chartered by an act of the legislature,) to that of the Union Pacific Railroad Company, Eastern Division, and by that name it is made a defendant to this action; but it is claimed to be the same corporation in its rights and liabilities as it was previously to such change in its name. The bill further shows that by act of Congress approved July 1, 1862, and the subsequent act amending the same, the Union Pacific Railroad Company was incorporated, and was authorized to construct its line of road through the Territories of the United States, and to receive land-grants and Government bonds to aid in the construction thereof. The allegations respecting the defendant are, that by the same acts of Congress it was authorized to construct its line of road through the adjacent Territories, and was to receive the same kind of Government aid in its construction, and upon the same terms and conditions in all respects as were annexed to the grants to the Union Pacific Railroad; and the first section of the act declares that this latter company "shall be able to sue and be sued, plead and be impleaded, in all courts of law and equity within the United States." These are all the facts necessary to be stated as respects the bill in order to raise the question of jurisdiction, unless it be the additional fact that the defendant has accepted the bounties of the act and has constructed a portion of the road therein contemplated.

The defendant pleaded to the jurisdiction of the court, stating that it was not an inhabitant of this District, but was an inhabitant of the State of Kansas, and that it was not found within this District when the subpoena issued in

the cause; that it was not doing business in this District and has never had any place of business therein, or any agent or person conducting its business within the said District. To this plea a demurrer has been interposed, or at least the plea is to be considered as demurred to. Upon this issue the question arises whether the defendant, which is a corporation chartered by and existing under the laws of the State of Kansas, is capable of being sued here, although it has no place of business and no agent within the District of Columbia. It is now settled beyond all controversy by repeated decisions of the Supreme Court of the United States that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created, and this doctrine has been maintained so long that all reasoning on the general principle is unnecessary. *Bank of Augusta vs. Earle*, 13 Peters; *Marshall vs. Baltimore and Ohio Railroad Company*, 16 How., 328, 18 How., 404; *Ohio and Mississippi Railroad Company vs. Wheeler*, 1 Black., S. C. R., 297. These and similar decisions not only establish the general doctrine just stated, but show that a corporation can only be sued in a different State from that in which it was created by express legislation, authorizing such suits against foreign corporations having agents within the State conducting the general business for which it was organized. This has been done in several of the States, but where there is no such exercise of the franchise and no business agent, a corporation for the purpose of adversary litigation, is to be considered an inhabitant of the State under whose laws it exists, and is not capable of being sued elsewhere. According to this principle it is manifest that this court has no jurisdiction of the defendant, which is strictly a State institution existing under the laws of Kansas, and the plea to the jurisdiction must be sustained unless the suit is authorized by some provision of the statute.

This power, it is said, is given in the act of Congress already referred to incorporating the Union Pacific Railroad Company. That act, as we have seen, provides that this last-named company can sue and be sued in all courts of law and equity within the United States, and it is argued that as the defendant has accepted the aid of the same statute it can

also be sued in any court of law or equity within the United States, as it has accepted such aid upon the same terms and conditions as were imposed upon the Union Pacific Railroad Company in the law. But we are of opinion that the defendant cannot be subjected to this construction. It is certainly true that the defendant accepted the grants upon the conditions specified in the statute, but we are quite clear that the remedies of suing and being sued were not in any sense affected by these terms. The conditions referred to in the act are expressly such as relate to "the construction of the railroad." The same privileges are extended to other railroad corporations created by the State laws of California and Missouri, and each of the companies are required to file their acceptance of the conditions of the act in the Department of the Interior within six months after its passage. Now, these conditions "for the construction of the railroad" are quite distinct from the general grant of franchises by which this defendant was clothed by the legislature of Kansas. There are franchises of a general character inseparable from every corporation, and which are recognized by all the laws of Congress and of the different States. To have a corporate name, to have perpetual succession, to sue and be sued, to hold property, to have a common seal and make by-laws, are the general and necessary attributes of these bodies. *Angel and Ames on Cor.*, 83. We find all these incidents in the congressional charter of the Union Pacific Railroad Company, and they are no doubt embraced in the defendant's charter from the State of Kansas. In addition to these general powers, Congress has given the right of way to these companies over the public lands, and has also offered them other subsidies upon certain conditions as to the mode of constructing the roads; as, for instance, it prescribes the time within which the work is to be done, the manner of securing payment to the United States for the amount of the bonds delivered, and that such bonds shall only be delivered and such grants of lands made upon the report of commissioners that a certain number of miles have been completed and equipped, and that the companies shall transport mails, troops, and munitions of war, supplies, and public stores, whenever required to do so by any department of the Gov-

ernment. Such are some of the conditions which Congress has annexed to its favors, and upon their performance the companies are entitled to the benefits contemplated by the act. It is evident that the conditions, so far at least as respects the defendant, are subjoined to the subsidies and do not affect the general franchise of the corporation; and its capacity to sue and be sued, and to have perpetual succession, together with the other powers inseparable from it as a corporation, are neither modified nor enlarged by the conditional terms of the Government bounties. It is therefore quite clear that the conditions referred to do not affect the right of the defendant to be sued; and as it is a State corporation, on well-established principles it is only suable within the territorial limits of the State in which it exists. And inasmuch as it has no place of business and no business agent conducting its affairs in this District, it is not capable of being found within the jurisdiction of this court.

Other considerations of the gravest consequence were presented on the argument; but as we find, upon a proper construction of the statute, that the court cannot entertain the suit as to the defendant interposing this plea, we deem it not only unnecessary, but more decorous to reserve an adjudication on points so generally important in a case in which we have no jurisdiction.

The decree appealed from is affirmed.

UNITED STATES vs. BARNEY WOOD.

AT LAW.—No. 9440.

- I. The jurisdiction of the circuit and criminal courts previously existing in the District of Columbia was transferred to this court by the organic act of March 2, 1863; and the relief now granted to a party convicted of crime in the criminal court is an appeal to the general term instead of the writ of error which was the mode of practice under the former jurisdiction.
- II. The decision of the justice holding the criminal court, overruling a motion for a new trial, is not a proper subject of review on an appeal to the general term.
- III. A motion for a new trial is an application to the sound legal discretion of the court in which the trial took place, and is not the subject of error or appeal.
- IV. Whether in case of abuse of judicial discretion so palpable in its character as to involve corruption or imbecility, the matter would be without remedy *quaere*.
- V. Alleged misconduct of a juror considered.

George P. Fisher, District Attorney, and Richard Harrington for prosecution.

A. G. Riddle for defendant.

CARTTER, C. J., stated the case and delivered the opinion of the court:

On the 1st day of October of this year the grand jury of this District returned into court a true bill of indictment against the defendant, charging him, in the technical language of the law, with the murder of one Samuel M. Cheeseman.

On the following day the defendant was arraigned, and to the indictment entered his plea of "Not guilty."

On the 10th of October a jury was sworn. On the following day, after evidence, argument, and instruction, the jury rendered a verdict of "Guilty."

On the 15th of the same month the defendant, by his counsel, moved the court for a new trial, and filed his reasons therefor.

As appears of record, the reasons alleged were:

1st. The misconduct of one of the jurors who tried the case.

2d. That the verdict was contrary to the evidence.

In support of the first ground the defendant offered two affidavits, which are of record.

Against the motion the United States attorney filed the affidavit of the juror sought to be impeached, together with others, tending to impeach the veracity of the persons making the affidavits offered in support.

On the 19th day of October the motion for a new trial was overruled, and the defendant sentenced to be executed.

From the judgment of the court in overruling a motion for a new trial, on the 22d of October the defendant appealed to the court in general term.

The second cause assigned for error is not insisted upon by counsel, or in any manner sustained by the record, and may be disposed of without further comment.

With reference to the first assignment of error, viz, "The misconduct of one of the jurors who tried the case," it is objected by the United States that the point made is not the subject of error, and, therefore, this court is without jurisdiction in the matter.

Reference to the act of July 7, 1833, establishing the criminal court of the District of Columbia, and the act of February 20, 1839, being an act to amend an act establishing the said criminal court, shows the legal relations of the criminal court to the circuit court, as they pre-existed the organization of this court, where it will be found that the only relief to a party convicted of crime in the criminal court was by writ of error to the circuit court, upon the allowance of the court or one of the justices thereof.

The jurisdiction of these respective courts was transferred to this court by the organic act passed March 3, 1863, to be exercised within the limitations of judicial authority theretofore existing.

The only change manifested in the acts transferring the

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jurisdiction is to be found in the mode of practice; appeal, as a necessity, being substituted for writ of error, inasmuch as a court cannot issue a writ of error to itself. The appeal thus provided for merely instituted a new method by which the defendant might be heard in error.

If we are right in this view, and of it we have no doubt, the question presented here is simply whether the judgment of the justice holding the criminal court, in overruling the motion for a new trial, is a proper subject of review in this court.

In resolving the question, we are first met with the hitherto determination of the question within this jurisdiction.

Chief-Justice Cranch, in the 4th volume of his Circuit Court Reports, announces as the opinion of the court that "a motion for a new trial is an application to the sound legal discretion of the court," and decided that it was not the subject of error.

This decision was announced as early as 1832, and does not appear to have been since disturbed. As far as this jurisdiction, therefore, is concerned, the question has heretofore been treated as *res adjudicata*.

Further examination advises us that the jurisdictions presiding over and kindred with this jurisdiction have uniformly held the same doctrine.

The judicial authority of Maryland, through which this jurisdiction largely derives its common law, and judicial interpretation, has uniformly held the doctrine announced by Chief-Justice Cranch, as will be found by reference to the decisions of the court of appeals, in the 5th volume of Harris and Johnson's Reports, in the case of *Anderson vs. The State*, 174, where the court uses this language:

"We are decidedly of opinion that the refusal of an inferior court to grant a new trial cannot be assigned for error. The law has been considered as settled in this country beyond all controversy, and no case can be found in England where a superior tribunal acting on the transcript of the record itself, brought before them by a writ of error, has entertained such a jurisdiction."

The same doctrine was repeated in *Wall vs. Wall*, 2d Harris and Gill's Reports, 81.

As in the courts of Maryland, so in the Supreme Court of the United States, we find the doctrine announced, beginning with the 6th volume of Cranch's Reports in the case of the *Marine Insurance Company of Alexandria vs. Hodgson*, and continuing down, through a uniform series of decisions, to the case of *Cheang Kee vs. The United States*, reported in 3 Wallace, supervening the period from 1810 to 1865.

The reasoning rendered by the Supreme Court of the United States furnishes the key to the uniform judgment of that tribunal. In the case of *McLanahan vs. The Universal Insurance Company*, reported in 1 Peters, 181, Story, J., says :

"It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice."

Thus it is seen that this court, and the courts in intimate advice and authority over this tribunal, have held uninterruptedly the doctrine that we are without jurisdiction, notwithstanding it is urged with much ingenuity and painful earnestness that the court disregard these authorities and adopt the conclusions of the highest tribunals of several of the States in their stead.

The court does not feel at liberty to do it. Without reviewing these authorities in detail, it may be remarked that many of them are the offspring of local legislation, and do not result in any well-defined and definitely-settled principles.

Some of them present extreme cases, where the action of the inferior court disclosed a fraud upon justice. We are not prepared to say that, in case of abuse of judicial discre-

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tion so palpable in its character as to involve corruption or imbecility, the matter would be without a remedy.

From this class of extreme cases the authorities presented entertain jurisdiction to the extent of reviewing very doubtful cases, until by this process the superior court is made to be substituted for the court trying the case, without any legal knowledge of the facts upon which it was tried. To these doctrines this court cannot consent; and these decisions, when viewed in the light of the cases in direct authority with this court, cannot be entertained.

Passing from the question of jurisdiction, without further comment it is due to candor for the court to say that had the motion been properly made to this court, had we the power to determine it, we should have been compelled to decide as did the court below.

The record presented to us furnishes evidence in support of the motion, that, one of the jurors being sworn touching his fitness as a juror in the case, and having declared he was without bias or prejudice, and that he had not formed or expressed any opinion, was accepted and sworn as a juror; that subsequent to the rendition of his verdict affidavits were made by one Potter and one Evans tending to show that previous to the trial the same juror had declared to them that this court and jury would convict them all; that Wood would share the same fate as Jenkins, alluding to Jenkins who had shortly before been convicted of murder, which affidavits were denied by the affidavits of the juror, and the further affidavits of eight witnesses that Potter and Evans were not worthy of belief under oath.

In its light it will be seen that the claim of the defendant was that the juror had said that the defendant would be tried, and would meet the fate of Jenkins; asserting what would be done rather than what he would do, making a doubtful claim in itself considered, and a new trial in the light of the contradictory and impeaching testimony more than doubtful.

It follows that the appeal should be, and is, dismissed.

MARY C. CAMPBELL vs. AMERICAN POPULAR
LIFE INSURANCE COMPANY.

AT LAW.—5707.

- I. A clause in a policy of life insurance that the company would pay the amount insured for, if in the opinion of their surgeon-in-chief the party did not die of intemperance, is a condition precedent to the right of the plaintiff to recover, and on the trial she must prove the decision of the surgeon, or account for its absence, as part of her case.
- II. The agreement to refer the cause of death to the opinion of the surgeon-in-chief is not void as contravening public policy, or because it has the effect of ousting the courts of their jurisdiction.
- III. It is only where the agreement to refer is incomplete and executory, and in which no arbitrators are chosen, that the courts will not permit their jurisdiction to be taken away; for in such case no reference has been settled by the parties that can be enforced in equity.

STATEMENT OF THE CASE.

The defendant insured the life of the plaintiff's intestate, who was her husband. The language of the policy is that the defendant "does assure the life of Nathaniel H. Campbell, of Lisbon post-office, in the county of Bedford, and State of Virginia, in the amount of five thousand dollars, for the term of life. And the said company does hereby promise and agree to pay the amount of the said assurance, at its office in the city New York, to the said Mary C. Campbell, her executors, administrators, or assigns, in ninety days after due notice and proof of the death, during the continuance of this policy, of the said person whose life is hereby assured, under the following conditions: That in the opinion of the surgeon-in-chief of this company the party insured did not die of intemperance, with which disease the party is now, or is supposed to be, affected, nor by any disease produced or aggravated by said disease; but if it is decided by the surgeon-in-chief that the party did die of said disease, or any other produced by said disease, then the company will only pay to the assured, and does agree to pay

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to the assured, within the above-mentioned time, an amount equal to all the premiums paid to the company by the assured, with compound interest thereon equal to the average of what the funds of the company have earned during the same time, as shall be stated by the treasurer, deducting from this amount only such sums as have actually been paid for the medical examination of the insured, and for commissions on the premiums of this policy."

The assured having died, proofs of death were presented. All the evidence collected, including that furnished by the plaintiff, was then laid before the surgeon-in-chief, and he decided that the assured died of intemperance, or a disease produced or aggravated thereby. Thereupon the company offered to repay the premiums with interest, and still so offers. The plaintiff claims the whole \$5,000.

On the trial the plaintiff offered certain testimony as to the cause of the death of the deceased. Defendants objected to the admission of this testimony on the ground that by the terms of the policy the question of the cause of death was to be settled by the opinion of the surgeon-in-chief of the company. The evidence was admitted, and defendants excepted.

After the plaintiff had rested her case, the defendant requested the court to nonsuit the plaintiff on the ground that she had failed to produce the proper evidence to enable her to maintain the action; which was refused, and the defendant excepted.

The defendant on its part offered proof of the opinion of the surgeon-in-chief as to the cause of the death of the deceased; which was excluded, and the defendant excepted. The defendant also excepted to the passages of the judge's charge, which are stated in the opinion of the court.

These are all the facts necessary to an understanding of the decision in the case, which is confined to the ruling upon that clause of the policy in regard to the opinion of the surgeon-in-chief that the insured "did not die of intemperance."

Frank Trigg and Fendall & Fendall, for plaintiff, contended that the rulings of the court below were correct, and cited 5th McLean, 464; 1st Phillips on Ins., 35; 2d Story's Eq., 1450, 1457; 2 Arnold on Ins., sec. 1245, p. 1259; 1st Wilson,

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it is unexecuted, be held available in the courts to bar an action, we say that an agreement of this nature, which is simply an agreement to refer it to a selected person to decide a special fact or facts, viz, how much the company shall pay, is an agreement which the courts not only should uphold, but which they always have upheld. It calls in the skill of a person, specially selected by the parties to the contract, to decide a matter for which such special skill is particularly needed.

All the cases requiring the certificates of engineers on railroads and of architects, to the amount and value of work, rest upon this principle. Such, among others, are *Wilson vs. York & Md. R. R. Co.*, 11 Gill & J., 58; *Faunce vs. Burke*, 16 Penn. State, 469, 489; *Monongahela Navigation Co.*, vs. *Fenlon*, 4 Watts & Serg., 205; *Lauman vs. Young*, 31 Penn. State, 306; *Snodgrass vs. Gavit*, 28 Ibid., 221; *Herrick vs. Vermont Central R. R. Co.*, 27 Vt., 673; *Fox vs. Hempfield R. R. Co.*, 14 Leg. Int., 148, referred to in 31 Penn. State, 311; *McMahon vs. New York Central R. R. Co.*, 20 N. Y., 463; *Glenn vs. Leith*, 22 Eng. Law & Eq., 489; *Ranger vs. Great Western Railway Co.*, 27 Eng. Law & Eq., 36, 45.

So the cases requiring the decision or certificate of any special person or class of persons named. *United States vs. Robeson*, 9 Peters, 319; *Arery vs. Scott*, 5 House of Lords Cases, 811, reversing S. C. in 8 Exchequer, 497; *Tredwin vs. Holman*, 1 Hurlstone & Coltman, 72; *Braunstein vs. Accidental Death Insurance Company*, 1 Best & Smith, 782; *Elliot vs. Royal Exchange Association Society Law Reports*, 2 Exchequer, 237; *Horten vs. Sayer*, 4 Hurlstone & Norman, 643; *Worsley vs. Wood*, 6 T. R., 710; and other cases cited below.

III.

It could well have been contended that the decision of the surgeon-in-chief was a condition precedent, and that the plaintiff, to maintain her case, ought to have proved what that decision was, or to have shown some excuse for not obtaining or relying upon it, such as the fraud or neglect of the surgeon-in-chief. In this point of view the plaintiff should for that reason have been nonsuited after her evidence closed. *United States vs. Robeson*, 9 Peters, 319; *Arery vs. Scott*, 5

such sums as have actually been paid for the medical examination of the insured, and for commission on the premiums on this policy."

For the assured, this would appear to have been a most favorable arrangement. At the time of the insurance the husband was affected, or was supposed to be affected, with "the disease of intemperance." The policy held out to him a reward of \$5,000 to be paid to his widow, upon his death, on condition of his reform; and promised that, even should his death be the result of his continued intemperance, all the premiums which had been received, with compound interest thereon, should be returned to his widow. The only advantage to the company was to be the retention of the premiums which had been received, in case the husband should be the survivor—most generally a remote contingency when the husband is addicted to intemperance.

Of course terms like these could be obtained only upon conditions, and one of the conditions in the present case was that which has just been quoted.

Within sixty days from the date of the policy, and when but one premium had been paid, the husband died. Payment of the whole \$5,000 was then demanded by the widow, but the company declined to pay it on the ground that, in the opinion of its surgeon-in-chief, his death had been produced by intemperance.

After a delay of more than two years, the present action was brought by the widow against the company, and service of the writ was obtained upon an agent of the company having an office, and doing business for his principal, in this District.

The declaration sets out the policy of insurance, at length, but contains no averment that the condition requiring the production of a decision of the surgeon-in-chief of the company as to the cause of death had been performed, nor any averment in excuse of its non-production.

The cause was tried upon two of the defendant's pleas, one of which averred simply that insured had in fact died in consequence of intemperance; and the other that the surgeon-in-chief of the company had decided that such had been the cause of his death.

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The plaintiff closed her testimony without having either produced the decision of the surgeon-in-chief, or shown any excuse for the omission.

The defendant then offered in evidence a certificate from the surgeon-in-chief to sustain the issue on its part, under the second plea; but the offer was objected to by the plaintiff, and the evidence was excluded by the court.

But inasmuch as we find, in the record, no bill of exceptions taken by the defendant to this ruling, we are in ignorance of the kind of certificate which was thus offered, as well as of the reasons of the court for its rejection as evidence.

If the offer was rejected because the surgeon's certificate was made or procured through fraud, or because he was interested in the cause, or for any other reasons supposed to be valid and sufficient to relieve the plaintiff from the performance of the condition in the contract on which she had sued, the facts ought to have been averred in the declaration, else they ought not to have been heard in objection to the evidence.

But in the absence of a bill of exceptions, we have nothing save conjecture to enlighten us as to the reasons influencing the mind of the chief-justice to reject the offer in question.

Thus the plaintiff having failed to produce the decision of the surgeon-in-chief as a part of her own case, and the court having rejected the offer of it when made by the defendant, the issue under the second plea was disposed of quite effectually.

But the question lay at the foundation of the plaintiff's own case, and was patent on the face of the contract and of the declaration. The declaration having itself set out the condition upon which the plaintiff could alone maintain an action, and containing no averment to excuse the plaintiff from procuring its performance, the plaintiff's difficulty was not removed by the rejection of this evidence when offered by the defendant. On the contrary, her difficulties were thereby aggravated; for the defendant's offer having been rejected, and no bill of exceptions taken, the surgeon's certificate was not in evidence for the defense, and therefore subject to no objection on the part of the plaintiff, either as

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to its conclusiveness in form, or for any fraud, or interest of the referee or of the company in making or procuring it; and the plaintiff was left with her case closed, and no evidence in, on her part, of the performance of the condition on which her right to maintain the action depended, nor any excuse, either averred in her declaration or proved at the trial, for her omission to procure its performance.

The cause of the plaintiff was therefore lost upon her own showing, unless the condition in question was void in law upon its face. But if we do not misunderstand the instruction given to the jury on this point by the learned chief-justice, he charged the jury that the condition was void in law. The following was his language, which we find brought into the record by one of the defendant's exceptions:

"The defendant, as before remarked, claims that he has satisfactorily and by credible proof vindicated the position assumed, that the defendant [the insured ?] died of a disease produced by intemperance. Now, if you find that the defendant has sustained, by clear and satisfactory proof, this issue of fact, you will find for the defendant. Nor need you pause in your deliberations to contemplate the issue involved in the submission of the case to the surgeon of the company, or the determination of the company upon the report of their surgeon adversely to the case. You may lay that out of view entirely under the decision of the court; but in laying it out of view do not misunderstand the court as assuming that it is set aside, because that decision was either right or wrong. The decision is simply not to affect your judgment one way or the other. It may be right or wrong. You are impaneled to determine whether it is right or wrong, upon the facts presented to you, and not facts presented to the company, and while you will disregard it you will not permit the removal of this issue from the case to prejudice an impartial estimate of the facts brought into the enlightenment of the issue that remains for you to determine.

The reason why the court has postponed this issue is because they have regarded, in the current history of the case, and still regard, any undertaking between parties that, in effect and substance, commits the judgments of the rights of two parties to the determination of one of them, to be

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void as against public policy. If the doctrine were to prevail that a man might bind himself by seal to commit his property, life, and personal rights to the arbitrament of a party in contract with him, the effect would be to throw the weak into the hands of the strong; and it is to prevent this state of things that the law has declared, and does declare, that the forum of justice shall be the interpreter of the rights of parties. This is the reason why the court deemed it essential to justice, and in vindication of law, to pronounce the reference to the surgeon-in-chief as a void reference in this undertaking, and to treat it as a blank."

If these doctrines be correct, then parties themselves ought not to be allowed to settle their own controversies, for this, too, would oust the courts of their jurisdiction. For all that a party may do himself, he can bind himself to do, if such should be the decision of his referee. It is on this ground only that a court of equity will sustain a bill for the specific performance of an award. In *Wood vs. Griffith*, 1 Swanson R., 54, Lord Eldon said: "That a bill will lie for the specific performance of an award, is clear, because an award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then this bill calls only for a specific performance of an agreement, in another shape."

These are not the doctrines of the law, as declared by the Supreme Court of the United States, in *United States vs. Robeson*, 9 Peters, 326, where the court say: "Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that, by time or accident, he is unable to do so."

The doctrine of this decision was elaborately and with much learning and ability vindicated by the supreme court of Pennsylvania in *The Mon. Nav. Company vs. Fenlon*, 4 W. and S., 205, in which case the referee was a stockholder in the company, and therefore interested in the result, and yet

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his award was held to be a *sine qua non* in the plaintiff's case because such was the contract of the parties.

The decisions to the same effect in that State, and other States, as well as in England, may be found so readily by reference to the digests, and are so numerous and so uniform, that it would be rather an ostentation of learning than necessary to refer to them all on this occasion.

The doctrine is, indeed, as ancient as the law itself, as may be seen in *Ughland's Case*, 7 Coke's R., and *Holdipp vs. Otway*, 2 Saunders R., 106.

"This last case was cited" (says Sergeant Williams in his note) "by Eyre, C. J., in *French vs. Campbell*, 2 H. Bl., 178, who says: 'Every possible condition upon which money is to become payable must be performed, or must be dispensed with upon sufficient grounds, before the money is demandable in an action; and in the declaration in which it is demanded it must appear that the condition has been performed, if not literally, at least substantially; or that, by reason of some default in the opposite party, the performance of the condition has been prevented, which dispenses with the performance.'"

In *Scott vs. Avery*, 36 E. L. & E. Rep., 18, the lord chancellor said: "If I covenant with A not to do a particular act, and it is agreed between us that any question which might arise should be decided by an arbitrator, without bringing an action, then a plea to that effect would be no bar to an action; but if we agreed that J. S. was to award the amount of the damages to be recoverable at law, then if such arbitration did not take place, no action could be brought."

And in the same case Lord Campbell, C. J., said: "While this case had been going on, the question had been substantially decided in the court of exchequer, during last Hilary term, in the case of *Brown vs. Overbury*, Excheq. R., 715; S. C. 34 Eng. R., 610. That was an action on a horse-race. The plaintiff, who had contributed to the sweepstakes, said that his horse had won the race, and he brought his action against the stake-holder to recover the amount of the stakes. But it was a condition in the race that the stewards should decide who was entitled to the stakes. It turned out that the stewards had not decided, for they differed in their opinions.

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Then he attempted to show that his horse had won the race. But the judge, presiding at the trial, held that he could not prove that, because, even if the horse had won, the action could not be brought until the question had been decided by the stewards. It was then taken before the court of exchequer, which decided that the ruling of the learned judge was correct, and the nonsuit was confirmed."

And the decision of the House of Lords in *Scott vs. Avery* was in accordance with these opinions.

But, in our judgment, the decision of the King's Bench in *Worsley vs. Wood*, 6 Term R., 710, a decision which has never, so far as we have been able to find, been called in question, either in this country or in England, is clearly in point, and decisive of the present case. The policy of insurance in that case contained a condition that "persons insured shall give notice of the loss, forthwith deliver in an account, and procure a certificate of the minister, church-wardens, and some reputable householders of the parish, importing that they knew the character, &c., of the assured, and believed that he really sustained the loss and without fraud;" and the court held that the procuring of such a certificate was a condition-precedent to the right of the assured to recover; and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate.

Lord Kenyon, C. J., said: "It was competent to the insurance office to make the stipulations stated in their printed proposals; they had a right to say to individuals who were desirous of being insured, 'Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, church-wardens, and some of the reputable inhabitants of your parish shall certify that they believe the loss happened by misfortune, and without fraud, otherwise we will not contract with you at all.' If the assured, say that the minister and church-wardens may obstinately refuse to certify, the insurers answer, 'We will not stipulate with you on any other terms.' Such are the terms on which I understand this insurance to have been effected; and, therefore, I am clearly of opinion that there is no foundation for the action."

It is worthy of note here, also, that the result in this case vindicated the course taken by the minister and church-war-

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dens; for the claim was shown to be fraudulent. No arguments or illustrations of our own could add to the force and clearness of this opinion. We think it conclusive of the question and of the present cause.

Up to this point we have been examining the case as it may be affected by the doctrine of the law, which requires the plaintiff to aver and prove the performance of a condition-precedent, to enable her to maintain an action under the contract.

But the learned chief-justice seems to have held the opinion that if the condition to be performed constituted the procuring of a decision of some named referee, who was in the employ of the adverse party, such condition was void, and therefore its performance need neither be averred in the declaration nor proved at the trial.

That the mere fact of the referee being in the service of one of the parties is no objection, in law, to the validity of the condition, is a proposition too plain, we think, to require an argument. We are, therefore, led to the opinion that it was the intention of the chief-justice to be understood by the jury, in that portion of his charge which was excepted to by the defendant, and quoted above, as affirming that the agreement to refer the cause of the insured's death, in the present case, to the decision of the surgeon-in-chief of the company, was void, because it would have the effect to oust the courts of their jurisdiction to decide that question—and not merely because the referee was in the service of the company.

It is not to be denied that a mere agreement between parties, that any future differences growing out of their contract shall be decided by arbitrators, or referees, thereafter to be chosen, will not be allowed by the courts to oust their jurisdiction.

But in this branch of the law there exist certain distinctions which, if carefully observed and followed, will, in our judgment, reconcile the authorities, and produce a beautiful correspondence, where, at first view, there may appear nothing but a conflict of authorities.

The leading case, on this question, was that of *Kill vs. Hollister*, 1 Wilson's R., 129, decided by the court of King's Bench. The following is the condensed and careful opinion in this

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case: "This is an action upon a policy of insurance, wherein a clause was inserted that, in case of any loss or dispute about the policy, it should be referred to arbitration; and the plaintiff avers, in his declaration, that there has been no reference. Upon the trial, at Guildhall, the point was reserved for the consideration of the court, whether this action well laid before reference had been. And by the whole court: If there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought and the plaintiff must have judgment."

To the same effect are *Thompson vs. Charnock*, 8 T. R., 139; *Goldstone vs. Osborne*, 2 C. and P., 550, and *Street vs. Rigby*, 6 Vesey, 818; following a prior decision made by Lord Thurlow, to which may be added, also, the opinion of the Lord Chancellor in *Scott vs. Avery*, already quoted.

These decisions, however, do not apply to an agreement where the parties have actually chosen and named the referee; for in such a case the court, in *Kill vs. Hollister*, say the reference might be pleaded in bar of the action. It is only the imperfect and executory agreement to have a reference, entered into hereafter, which the court say will not oust its jurisdiction. It is because no reference has been agreed upon, and settled between the parties, that the agreement is not a bar.

An imperfect and executory agreement such as that referred to, cannot be enforced in equity for the reason that a court of equity will not and cannot compel the parties to come to an agreement in the choice of referees. If one of the parties should say, I decline to choose an arbitrator myself, and am not willing to consent to the choice made by my adversary, how could a court of equity compel him to carry out his contract? And, even if it had the power to do so, it would not, in the exercise of its discretion over such matters, for other reasons stated by Lord Eldon in *Street vs. Rigby*.

If the controversy, therefore, be not in effect actually referred, by such an agreement, as it certainly is not, according to these decisions, it must remain under the jurisdiction of the courts, and a plea setting up such agreement is, therefore, no bar.

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Suppose the court in *Kill vs. Hollister* had held the plea in bar to be good, what would have been the consequence? In the first place, judgment would have gone for the defendant, and then the only remedy left to the plaintiff would have been an action on the agreement to refer, which the defendant had refused to comply with. In such an action, the breach to be alleged must be the defendant's refusal to submit the controversy to arbitration. But what would be the rule of damages on such an issue? It must be the amount lost by the plaintiff in being defeated in procuring the arbitration, by the refusal of the defendant to choose. But who can tell on whom or what character of persons the choice might have fallen for arbitrators; or what evidence might have been received by them; or what would have been their award, whether in favor of the plaintiff at all, or, if in his favor, how much? It would be impracticable in such an action to find any rule of damages; and the consequence would be, that the plaintiff would get a verdict for nominal damages only. Thus the plaintiff must have found himself doubly defeated; first by the plea in bar of his action, and then by the verdict in his favor for nominal damages, to which the court had driven him by sustaining the plea.

Of course an agreement for reference such as that, followed as it must be by consequences such as these, could not be construed to oust any court of its jurisdiction.

This is the argument, as we understand it, of Lord Eldon in *Street vs. Rigby*. "Suppose," said he, "an action brought," (on such an agreement to refer.) "The question would be, what damages would have been, if the defendant had joined, and named an arbitrator, and evidence had been produced (and what that would be could by no means be correctly proved) and an award had been made, giving some supposed sum, which no proof could ascertain. The effect, therefore, of such a covenant, is that as the damages are not to be ascertained by evidence, nominal damages only can be got. But," he adds, "there are prudential ways of drawing these articles. There might have been an agreement for liquidated damages to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for specific performance."

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The effect of these decisions, therefore, is this, and nothing more, that an agreement to refer, which is so imperfect as not to be specifically enforced in equity, and for breach of which nothing but nominal damages can be recovered at law, will not be allowed to oust the courts of jurisdiction, else there must be a failure of justice; or, in other words, courts will not permit their jurisdiction to be ousted by an agreement which, from its defects, is impotent for that purpose; or, in a form still more succinct, the agreement shall not "oust the court," because it does not.

But even so nugatory a contract as that is neither contrary to public policy, nor void, for an action may be maintained for its breach, although, for the reasons already stated, the plaintiff can recover only nominal damages. But if the contract be drawn in the "prudential way" recommended by Lord Eldon, by inserting a stipulation for liquidated damages; or there be a separate bond to bind the parties by penalty to its performance, the contract must be fulfilled, or the penalty will be enforced. Would it not be a strange spectacle, however, to witness a court sustaining an action for the penalty of a bond, or for stipulated damages, for the breach of a contract, void as against public policy?

Nowhere have we been able to find any decision, or even dictum of a court, to sustain the doctrine announced by the court below, on the trial of this cause, that a contract binding the parties to a reference of their controversies was contrary to public policy. On the contrary, the sole ground of the decision on this subject is to be found where, from the lameness and inadequacy of such agreements, the parties have failed to provide any new tribunal of their own choice to supplant the jurisdiction of the courts, or provide for a penalty, or stipulated damages.

In *Burchell vs. Marsh*, 17 How., Mr. Justice Grier said: "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either of law or fact.

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A contrary course would substitute the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."

For these reasons we think the judgment of the court should be reversed, and a new trial awarded.

CARTTER, C. J., dissenting.

REPORT OF CASES

DECIDED BY

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, AT JANUARY GENERAL TERM, 1874.

EDWARD RUSSELL vs. ALFRED RUSSELL.

AT LAW.—No. 2237.

- I. The testimony showed that the payee named in a promissory note died in 1863, and that his widow acted for some time afterward as sole executrix of his will, and in that character indorsed the note to the plaintiff. Held that in order to enable plaintiff to maintain an action upon said note, it is necessary to produce and prove a will conferring authority upon such executrix to transfer such note absolutely as the property of the plaintiff.
- II. The fact that no such proof, when it could have been easily obtained, was produced, might well excite suspicion that there was a purpose in withholding it.
- III. In order to constitute negotiability, a promissory note ought upon its face to be for the payment of a sum of money certain as to amount, so that an indorsee may maintain an action upon it in his own name.
- IV. A promissory note, dated at Detroit, in the State of Michigan, and payable there, for \$2,000, with interest at the rate of eight per cent., *with current exchange on New York*, is not for a sum certain, and is therefore not a negotiable instrument.
- V. The executrix indorsed the note in Alabama during the late war, and gave it to a messenger, who conveyed it through the military lines, and delivered it to the plaintiff at Leavenworth, in the State of Kansas, and there was no evidence to show that the indorsement was not of a commercial character. Held that the indorsement and transmission of the note was unlawful under the non-intercourse act of July 13, 1861, and passed no title to the plaintiff.

STATEMENT OF THE CASE.

The case is stated in the opinion of the court.

W. S. Cox and *W. B. Webb*, for plaintiffs, discuss elaborately the question, in their printed brief, whether the indorsement and transmission of the note in suit by the executrix of the payee through the military lines during the war was in violation of the non-intercourse act, and conclude with the following points :

1. Was the indorsement by the executrix such a contract as comes within the provisions of the act of July 13, 1861 ?

It is submitted that while it is well settled that an executrix may indorse a note payable to the order of a decedent, (*Rand vs. Hubbard and others*, 4 Metcalf, 252,) the indorsement when made is unlike that of an ordinary payee, in this, that the executor incurs no responsibility by making the indorsement. (Story on Promissory Notes, sec. 120.)

The executor is the creature of the will, and may be compelled to indorse a note, part of the estate of the testator, so as to pass title to a distributee or legatee.

2. Was the mere transmission of the promissory note such an act as will sustain the ruling below and make the note invalid ? It must be within the prohibitions of the act of July 13, 1861, to be amenable to such criticism. In *Allen vs. Russell*, already cited, it is expressly declared that the specifications in that act give the extent of its operation. The note in question does not come, and cannot be brought, within these specifications.

C. F. Peck for defendant:

It did not appear either in the pleadings or in the evidence that the transaction was other than an ordinary business transaction, by which an executor indorses a note to another. It was not shown to have been connected with the payment of any legacy to the plaintiff.

The only question raised by this bill of exceptions is whether a suit can be maintained by the indorsee of a note, the indorsement having been made during the war, within a State declared to be in insurrection and within the confederate lines, and sent by a messenger through the military lines into a loyal State, and there delivered to the indorsee,

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the indorser being a citizen of and resident in the insurrectionary State, and the indorsee a citizen of and resident in a loyal State. *Willison vs. Patterson*, 7 Taunton, 439; *Griswold vs. Waddington*, 1 Johns., 483.

A state of civil war suspends all contracts in existence between the respective belligerent parties at the time of its commencement, and all contracts made during its existence are void. *Semmes vs. City Fire Insurance Company*, 6 Blatch., O. C. R., 445; *Levy vs. Stewart*, 11 Wall., 250.

A just application of this rule would show that there was nothing for the indorsement of the executrix to act upon. The paper signed by the defendant had no vitality when it was indorsed. It was not at that time an existing contract, and of course could not be negotiated.

During the existence of a war interest does not accrue on money due on a contract between citizens of the belligerent parties. *Bigler vs. Waller*, 3 Am. Law Times R., 157; same case, 3 Chicago Legal News, 26; *Hoare vs. Allen*, 2 Dallas, 102.

The position taken by the plaintiff, that the public law on this subject is limited and restrained by the express language of the act of July 13, 1861, is not tenable, as the cases before cited show. That act, after prohibiting all commercial intercourse, further provides, "that all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State, be forfeited to the United States." In the case of the *Ouachita Cotton* (6 Wallace, pp. 525, 526) the precise point was made that this was the penalty to be meted out to those violating the law, and therefore the statute must be limited to offenses of that character; but the court held otherwise, and applied the prohibition in the full spirit of the public law as laid down by Chancellor Kent.

Mr. Justice WYLIE delivered the opinion of the court:

This action was brought by the plaintiff as indorsee against the defendant as maker of a note, of which the following is a copy:

D. C.

[Jan. T.,

II

BOIT, January 1, 1856.

to pay to the order of
llars, with annual inter-
nt exchange on N. Y.

.LFRED RUSSELL."

or order.

Y F. RUSSELL,

Executrix."

s a citizen of Alabama,
Michigan, at the date of
ar 1863, at his residence,
rar, the widow indorsed
e hand of a person com-
aintiff, her son, who was
f Kansas; and this was

ons, there would be but
s case, namely, whether
de within the rebellious
mission across the lines
d its delivery to the in-
l intercourse as was un-
the fact, the indorsement
ght to sue upon the note

unsel, it has been agreed
ler the note may be con-
f incorporated in said bill

ses upon the face of the
F. Russell, executrix, to
face is payable to the
estimony shows that he
ted for some time after-

But that is not the way
The plaintiff went to the
lepositions at Zainesville,
of establishing this one

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fact by witnesses, examined *ex parte* and without notice, under the 30th section of the act of 1789. If the will conferred the power, and was not set aside for any cause, a copy duly authenticated or proved should have been produced. The fact that no such proof, so easily obtained, was procured, might well excite suspicion that there was a purpose in withholding it. In any view, however, the authority to make the indorsement can be proved only from the will itself, or an authenticated or proved copy.

The next question arising on the face of the note, is whether it is an instrument negotiable, so that an indorsee may maintain an action upon it in his own name.

Its promise is to pay \$2,000 with annual interest at the rate of eight per cent., and current exchange on New York.

There was no evidence at the trial to show what was the legal rate of interest in Michigan, where the note was made, and where it was also payable, so that we cannot say that the note is on its face usurious.

But in order to constitute negotiability, a promissory note ought, upon its face, to be for the payment of a sum of money certain as to amount. In *Philadelphia Bank vs. Neickirk*, 2 Miles R., 442, the note contained these words: "current rate of exchange to be added," and they were held to exclude negotiability. The rule that the amount must be certain is laid down in all the books, so that no authority on the point is here deemed necessary. Had the note been made payable in New York, the payee or the maker thereof would have had the benefit of the exchange at the maturity of the note, as the rate might be in favor of the one place or the other at that time, and the transaction might not have been objectionable.

The present case is different. The note in question was made at Detroit, and was payable in Detroit, with eight per cent. interest annually, and current exchange on New York. So that had it happened, at the maturity of the note, that exchange was in favor of Detroit and against New York, the maker could have had no advantage from that circumstance, for he must notwithstanding pay the whole sum, with interest. If the transaction be clear of fraud upon the law, there is no objection to making a note payable at a different place

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from that where it was made, and this is a very common form of mercantile business; for *non constat* that the stipulation may not turn out to be favorable to the debtor, according as the rate of exchange may be between the two places. But the present is not such a case; the note in question was payable in Detroit, and if exchange on New York had at its maturity been in favor of Detroit, the maker must still have paid the whole; but if, on the contrary, the rate of exchange had been the other way, he would have been obliged to pay the exchange, whatever it might be, in addition to the amount of the principal and interest.

The note in question is one of very uncommon form, and it seems to us a very objectionable form of paper. What would be thought of it by the courts if a note were made payable in New York, with legal interest, and exchange on London? A person may draw his bill on London, or make his note payable in London, if he choose, and it would be liable to no objection. But to draw or make such paper for a certain sum, and rate of interest, with exchange on Paris or St. Petersburg, would be outside of all the recognized forms of business. This note is not, therefore, in our opinion, a negotiable instrument.

Grutacap vs. Woulluisse, 2 McL. R., 581, is, we think, quite reconcilable with these principles. There is no report of the facts in that case except what is contained in the very brief opinion of the court. The note was made, and the transaction took place, in New York, but was made payable at the Detroit City Bank, with current rate of exchange on New York. It was in effect, therefore, nothing more than a note payable where it was made. It was made in New York and payable at Detroit, with exchange on New York. Nor does it appear in the case but that the action was in the name of the payee, in which case the point as to negotiability could not have arisen.

As to the question of the effect of the war upon the transaction, we think there was no error in the opinion of the court below. There was no evidence given by the plaintiff to show that the indorsement by Mrs. Russell was not one of a commercial character. To be sure she was the mother of the plaintiff, and we might entertain a private conjecture

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that the note had been bequeathed to him by the will of his father; but we are absolutely without evidence upon that subject. Since the plaintiff has thus left us in darkness as to facts most important to the decision of his case, we are obliged to assume, not only that he had no right to the note in question under his father's will, but that its professed assignment grew out of some transaction for which it was the consideration, and in consequence was unlawful under the act of 13th July, 1861.

Had a copy of the will, duly proved or authenticated, been produced in evidence, and it had there appeared that the note in question had been left to the plaintiff by his father, and that the widow, Mary F. Russell, was executrix, and had power to indorse it over to the legatee to whom it belonged, the case would have presented an appearance very different from that it now presents, so far as it relates to this question under the non-intercourse act. The other objection, however, to the plaintiff's recovery in this form of action, would have remained unaffected by such proof.

Judgment affirmed.

ELIZABETH C. COWAN vs. CORDELIA BEALL.**IN EQUITY.—No. 3017.**

- I. A deed of lands in the State of Maryland acknowledged in the District of Columbia, before a justice of the peace of said State of Maryland, but who is not authorized by law to take acknowledgments of deeds in the said District of Columbia, is defective and void.
- II. If such deed has been recorded and all the purchase-money paid, the court will direct the vendor to execute a valid deed of the premises; and, in default of compliance with such decree, that the decree stand for a conveyance of the property.
- III. When written instruments in the testimony are declared by the opposite party to be forgeries, the court will determine their genuineness by an inspection of the instruments, the preponderance of the evidence, and will also examine the acts and circumstances of the parties.
- IV. The opinion of experts as to the genuineness of signatures is the most unsatisfactory of any proof admitted by a court.

STATEMENT OF THE CASE.

The bill in this case states that on the 9th of July, 1864, defendant sold and agreed to convey in fee to the complainant lots of land 41 and 42, with the house and improvements thereon, in Bladensburg, Maryland, for the consideration of \$1,700; that on the day of the sale complainant paid defendant \$1,000 of the purchase-money, and agreed to pay the balance in a short time. Defendant thereupon executed and delivered to complainant a paper purporting to be a deed in fee to the property, which the complainant placed on record, and in the said month of July defendant delivered possession of the premises. That the said deed is defective for the reason that the acknowledgment thereof was taken in Washington, in the District of Columbia, before one Richard Hopkins, a justice of the peace for Prince George County, in the State of Maryland, having no authority to take acknowledgments of deeds in said District of Columbia, although it is so expressed in his certificate. Complainant also avers that she has paid the balance of the purchase-

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money, but defendant refuses to execute a good deed, and concludes by praying that the defendant may be decreed to execute, acknowledge, and deliver a good fee-simple deed of said premises to the complainant.

The defense set up in the answer is that only \$1,000 of the purchase-money has been paid, and that \$700, with interest from July 9, 1864, is still due the defendant. It is also averred that said Hopkins informed complainant before the deed was executed, that, as a justice of the peace in Maryland, he could not take acknowledgments in the District of Columbia, but complainant insisted upon having it done, and it was done to gratify her. And defendant expresses her willingness to execute a proper deed upon payment of the money due her.

The testimony is quite voluminous and conflicting as to whether the \$700, part of the purchase-money, had been paid, and whether certain receipts therefor, presented by complainant, were genuine.

The court, in the opinion following, state the facts in considering this part of the case.

The decree was passed June 12, 1873, and directs the defendant to execute a valid deed of the premises in question to the plaintiff, and to pay the costs of the case; and in default of her complying with the decree, that the decree stand for a conveyance of the property.

The defendant appealed, and the case comes here upon that appeal.

A. C. Bradley for complainant.

R. D. Mussey for defendant.

CARTTER, C. J., delivered the opinion of the court:

In the case of Elizabeth C. Cowan against Cordelia Beall, which was submitted at the close of the session on yesterday, the court have come to the conclusion to affirm the decree below.

The bill of complainant sets forth in substance that on the 9th day of July, 1864, Mrs. Beall, being the owner of a house

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and lot in the town of Bladensburg, county of Prince George, Md., put it upon the market and found a purchaser in Mrs. Cowan; and after negotiation they came to the conclusion to sell and buy for the sum of \$1,700, as a cash-sale; possession to follow the purchase. In furtherance of this agreement the parties met in this city, Mrs. Beall accompanied by a magistrate from Prince George County, Maryland, by the name of Hopkins.

The deed was drawn up in due form with full covenants, signed by Mrs. Beall, acknowledged before said Hopkins, and delivered to Mrs. Cowan, who thereupon paid to Mrs. Beall \$1,000.

Mrs. Cowan had been disappointed in getting all her money ready, so that at the time of the delivery of the deed \$700 remained unpaid, which it was agreed should be paid in a short time.

To secure this, Mrs. Beall desired Mrs. Cowan to execute a mortgage on the premises, which was talked of, but never done; but a bond was afterward executed by a man named James, from New Jersey, for \$700, and delivered by Mrs. Cowan to Mrs. Beall.

The facts thus far are all agreed to, but here the concurrence ceases. Mrs. Cowan claims that she afterward paid Mrs. Beall the \$700, and Mrs. Beall denies it.

Here is the issue in the case: Was this \$700 paid? The complainant, in corroboration of her statement, presents a series of papers, a receipt for \$400, a promissory note for \$300, given by her to respondent, and taken up; and a promise by respondent to return to complainant the said bond, which it is agreed all around never was restored to Mrs. Cowan.

This promise reads as follows:

“I promise to return to Mrs. Cowan (if found) a bond belonging to her and mislaid by me between July 10 and this date, I holding her promissory note for the balance due (three hundred dollars) on house in Bladensburg.

“CORDELIA BEALL.

“JULY 25, 1864.”

The note, purporting to be signed three days before, and which is in Mrs. Cowan's handwriting, is as follows:

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“Twenty days after date I promise to pay Mrs. Beall three hundred dollars, balance due on house bought July —, 1864.

E. C. COWAN.

WASHINGTON, *July 22, 1864.*”

[Indorsed:] “C. Beall.”

Date after *July* torn off.

The receipt is as follows:

“Received of Mrs. Cowan four hundred dollars. Note for three hundred for twenty days, in payment for house bought on 9 July, 18—.

WASHINGTON, *July 22, 1864.*

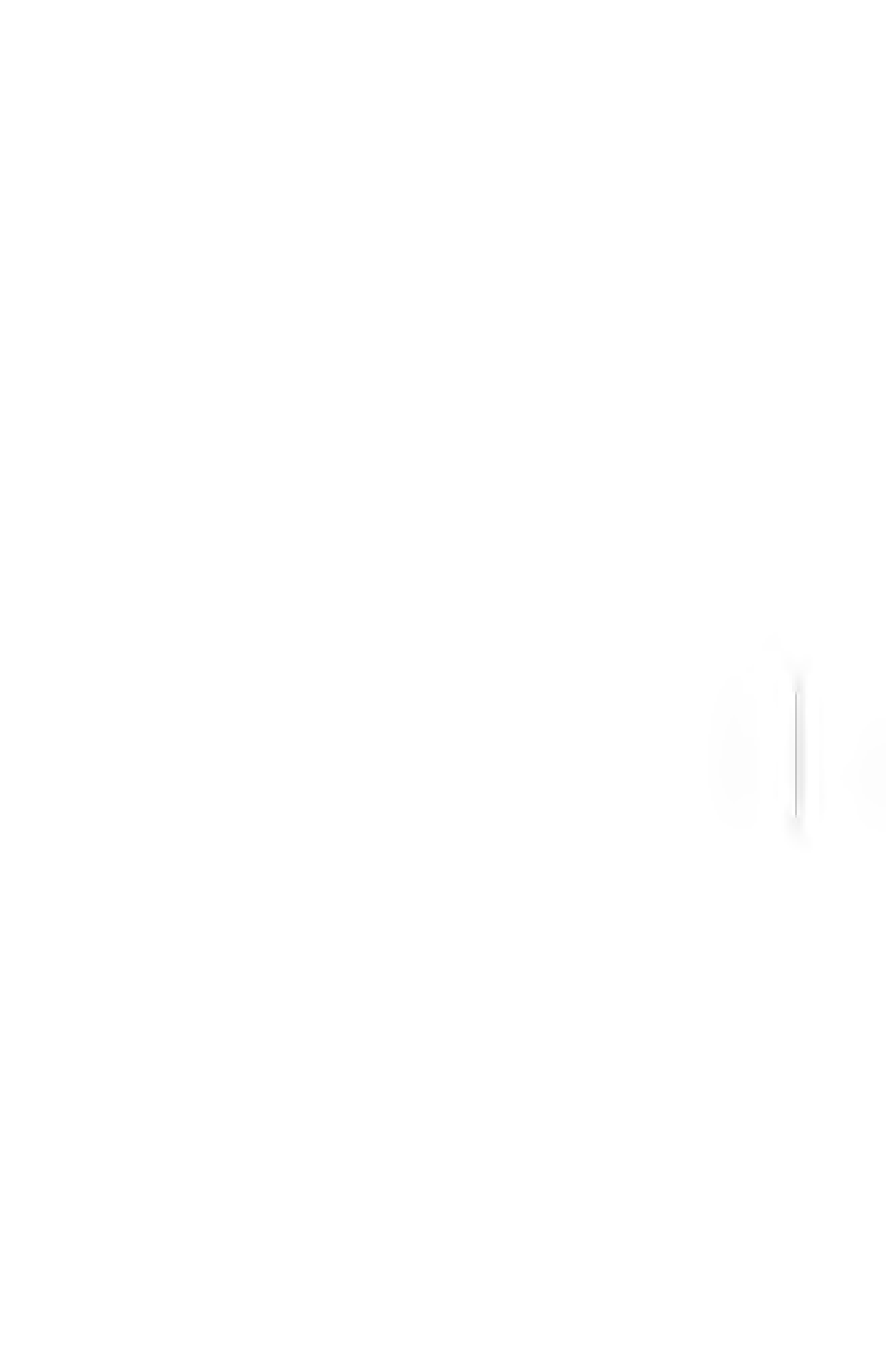
CORDELIA B——”

Balance *name* and *date* torn off.

These several evidences of written proof are presented by Mrs. Cowan, two having been executed by Mrs. Beall, and the other by Mrs. Cowan to Mrs. Beall, and taken up. And the vouchers are met by the declaration that they are forgeries, and sustained by falsehood and perjury. And the court is called upon to pass upon this delicate issue between these two ladies. That one or the other of them has forgotten the facts distressedly, there can be no doubt.

The question occurs, upon which side is the preponderance of evidence and the burden of proof? Here is a contract for the sale of the property, the grantor going out of possession and the grantee going in with the consent of the grantor. The sale was made upon a cash basis; \$1,000 paid, and the balance guaranteed by the bond given. So we think that so far as the acts of these parties are concerned, in consummating the arrangement, the testimony is decidedly in favor of Mrs. Cowan.

The evidence shows Mrs. Beall to be a woman of some experience, and having an eye to speculation she bought this property to sell, and sold it within a year at a greatly increased price. It is hardly to be presumed, we think, that a woman of this astuteness and shrewd business qualifications would deliver up the possession of her house to a purchaser without provision being made for the payment of the purchase-money. She certainly did not, but required a guaran-



**CHARLES WALTER AND REGINALD FENDALL,
ASSIGNEES OF JOHN LANE, A BANKRUPT, vs.
ELIZABETH E. LANE ET AL.**

IN EQUITY.—No. 3251.

- I. A voluntary conveyance to a wife by a husband of the bulk of his property is void as against existing creditors.**
- II. There is a presumption of law and fact that the grantor in such a deed intends a fraud upon his creditors, and the mere declaration of the parties to such a transaction that they acted in good faith will not be sufficient to repel this inference.**
- III. As respects subsequent creditors, the conveyance is not void unless there is intentional fraud contemplated by the grantor in the creation of future debts.**
- IV. If, however, in a court of equity, a conveyance is set aside as being voluntary and fraudulent against existing creditors, the creditors whose debts have been contracted since the execution of such conveyance may come in and share in the benefit of the fund thus created.**
- V. The statute of 13 Elizabeth in regard to frauds and perjuries is the law of this District, and declares all conveyances void which are made to defraud such creditors as the grantee is indebted to at the time; but in a case of actual fraud as respects subsequent creditors, the deed will also be declared void.**
- VI. If a voluntary conveyance be made with a view of becoming indebted, that fraudulent intent may be inferred from the fact that the grantor contracted debts immediately after he made it and has not paid them.**
- VII. When a person is indebted in a small amount, and has ample means, and is not embarrassed in his circumstances, he may make a gift in favor of his wife and children, and it cannot be impeached, for want of consideration, by his creditors.**

***Fendall & Fendall and Th. Jessup Miller* for complainants:**

The suit is instituted for the cancellation and rescission of certain deeds, and for the delivery up of certain instruments, which are recognized branches of equitable jurisdiction. Adams' Equity, 167; Story Eq. Jur., §§ 703, 906; Cooper's Eq. Pl., 132; *Osborn vs. Bank U. S.*, 9 Wh., 845.

under the 35th section, act of March 2, 1867. 14 Stats. at Large, 534.

A man indebted conveying voluntarily is always looked upon as meaning a fraud on his creditors. Mad. Ch., p. 366.

Moore & Newman for defendant, Elizabeth E. Lane:

We contend that that part of the decree which authorizes and empowers the complainants to demand and receive from Geo. W. Riggs, receiver, the two notes of Jacob Ramsburg & Sons, described in these proceedings, and to collect the same for the benefit of the proper creditors of said bankrupt, is erroneous, for the following reasons, to wit:

1st. That it is averred in the answer of said Elizabeth E. Lane, and is supported by the most indubitable and cogent proof, and is not denied by the complainant, or, at least, they have introduced no testimony to the contrary, that the money represented by the two promissory notes aforesaid was given to her in good faith by her husband *nearly two years previous* to the institution of this suit, and at least one year and a half prior to the bankruptcy proceedings mentioned in the bill.

2d. That at the time of said gift, and for a long period thereafter, it is abundantly proven, and not attempted to be contradicted by the plaintiffs, that the said Lane was in a flourishing pecuniary condition, being worth from \$15,000 to \$25,000 over and above his liabilities, and also that he was perfectly solvent, and never had any intention to take the benefit of the bankrupt-act, or of being forced into bankruptcy, or to make any transfer or conveyances by which to defeat, delay, or hinder any of the creditors to whom he was then indebted to a small amount.

3d. That nearly all the unsecured debts for which said John Lane was forced into bankruptcy were not contracted by said Lane until about fifteen or eighteen months after the said gift of money represented by said two notes of Ramsburg & Sons, and those few which had been contracted at the said time when, &c., the bills or accounts either had not been presented or were not due and owing, according to special understandings or agreement between the said Lane and said creditors; and these facts, we maintain, are conclusively

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proved to the satisfaction of any reasonable mind by the defendants' witnesses, and by a copy of the schedules, &c., of said bankrupt filed in this cause, the plaintiffs failing to introduce one scintilla of evidence to the contrary.

We might here assert that the plaintiffs have introduced *no legal testimony* to disprove any of the averments in the answer of Elizabeth E. Lane touching either the said \$2,500 or any of the merits of the case as shown by the bill and answer, &c., but rely almost exclusively upon the record.

4th. We respectfully submit, fourthly, that under the Constitution of the United States she could not be deprived of her money or property in said notes without the intervention of a jury, and for this reason alone, to say nothing of the preceding ones, we earnestly insist that said decree is erroneous, and in support of these reasons we cite the following authorities :

A voluntary settlement or gift made in consideration of marriage only, by a solvent party without fraudulent intent, will not be set aside as void. Such is the settled law, both of England and the United States. *Sedgwick vs. Place*, 4 American Law Times, Leading Cases, United States Courts Reports, p. 179.

This is a case exactly in point, and we earnestly request the attention of the court. *Sexton vs. Wheaton*, 8 Wheaton, p. 229; *Hinde's lessee vs. Longworth*, 11 Wheaton, p. 199; *Carpenter vs. Roe*, 10 New York, p. 227; *Bank of United States vs. Housman*, 6 Paige, p. 526; *Babcock vs. Eckler*, 24 New York, 623; *Van Wyck vs. Seward*, 6 Paige, 62.

Mr. Justice MACARTHUR stated the case and delivered the opinion of the court :

The bill in this case was filed in equity to set aside conveyances of real estate and transfers of other property alleged to have been made in fraud of creditors. The bill charges that on the 29th day of November, 1872, John Lane, one of the defendants, was entitled to and possessed the equity of redemption in parts of lots 128, 129, in Beatty and Hawkin's addition to the city of Georgetown, and also owned and possessed all the goods, furniture, and personal

effects in the dwelling-house upon said premises; and being such owner at the date above mentioned, he conveyed the same to Robert H. Ward, and the said Ward conveyed the same back to the defendant, Elizabeth E. Lane, wife of said John Lane, for the nominal consideration of \$10,000, but that in fact said conveyances were without anything being paid by the grantees in either case.

The bill also charges that the said Lane theretofore owned the sum of \$2,500, which he loaned to Jacob Ramsburg & Sons, taking their two notes therefor indorsed by one John E. Cox, and transferred the same to his said wife, and that the same is now in her custody and control. Other transfers of accounts are also set forth, but we do not deem it necessary to consider them in disposing of the case.

The bill seeks to set aside the conveyances of real estate as in fraud of creditors, and to subject the aforesaid notes to the payment of the debts of said Lane, on a charge that he has transferred them to his wife for the same fraudulent purpose.

On the 19th of March, 1873, the creditors of said John Lane filed a petition to have him declared a bankrupt, and on the 27th of the same month he was adjudged a bankrupt, and on the 15th of April following the complainants in this cause were appointed his assignees.

The court at special term decreed that the deeds from Lane to Ward, and from the latter to Mrs. Lane, were fraudulent and void as to Lane's creditors, and authorized the complainants to receive the two notes of Jacob Ramsburg & Sons, and to collect the same for the benefit of the proper creditors of the bankrupt.

The cause is now before us on an appeal from this decree.

In order to determine whether the deeds of the lots in Georgetown are fraudulent, a reference to the circumstances under which they were executed becomes necessary. The facts bearing upon this point are few and decisive. It is admitted that the property was conveyed to Mrs. Lane as a voluntary settlement; that she has paid nothing, and does not expect to pay any consideration therefor; that she had no property at the time of her marriage and has acquired none since except by gift from her husband. The amended

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schedules of the debts and property of John Lane in the bankrupt proceedings are made exhibits in this case, and from them it appears that his unsecured liabilities exceeded \$3,500, and that about \$1,200 of this indebtedness was incurred previous to the execution of the deeds in question. It also appears from the testimony of Lane himself that he owned no other property at this time except his stock in trade, worth, according to his own estimate, \$2,400; but when he filed his schedules, within four months afterward, this had been reduced to \$100, which he claimed as an exemption. We think these circumstances clearly show that the conveyances were in derogation of the rights of Lane's creditors, and that the decree below properly declared them void as against such creditors for that reason.

Both Lane and his wife claim in their answers and testimony that these deeds were made in good faith and without any fraudulent intention, but we must believe that parties intend the inevitable consequence of their acts. When the grantor in a deed, without receiving any real consideration for it, conveys the bulk of his property out of the reach of his creditors, there is a presumption of law and fact both that he intends to defraud them; and the mere declaration of the parties to such a transaction that they acted in good faith will not be sufficient to repel the unfavorable inference.

Another question arising in the case is whether creditors whose debts were created subsequently to the date of the conveyance are entitled to share in the proceeds. The statute of 13th Elizabeth, which is the law of this District, declares all conveyances void which are made with intent to defraud creditors; but only embraces such creditors as the grantor is indebted to at the time of the conveyance. The decisions are very numerous which hold that mere voluntary settlements are within the statute, and therefore void as to existing creditors. The Supreme Court has given its unqualified assent to this doctrine in *Sexton vs. Wheaton*, 8 Wheaton, 227, and the distinction between existing and subsequent creditors is clearly made; and it is held that as respects the latter the conveyance is not void unless there is intentional fraud contemplated by the grantor in the creation of future debts. This decision was made in the case of a subsequent

creditor seeking to have a voluntary conveyance in favor of a wife declared void ; but that court has never had occasion to pass upon the question, where the conveyance is set aside at the suit of antecedent creditors, whether creditors whose debts have been contracted since its execution may not come in upon the fund thus created. The proposition has been considerably discussed, and different views have been expressed ; but I can find no adjudged case against it, and there are several in its favor.

Mr. Chancellor Kent, in his celebrated judgment pronounced in *Reade vs. Livingston*, 3 Johns. Ch. R., 497, remarks : "The cases seem to agree that the subsequent creditors are let in only in particular cases, as where the settlement was made in contemplation of future debts ; or *where it is requisite to interfere and set aside the settlement in favor of the prior creditors.*"

In *Ede vs. Knowles*, 2 Younge & Coll., B. R., 172, 178, cited in the notes to Story Eq. Jur., sec. 361, Mr. Vice-Chancellor Bruce says : "The plaintiff does not allege by his bill that he was a creditor at the time of the settlement. I apprehend that a deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though when it shall have been set aside subsequent creditors may be let in."

The only view expressed by Story himself, I find in the note preceding the one just cited, in which he says : "Where the settlement is set aside as an intentional fraud upon creditors, there is strong reason for holding it so as to subsequent creditors, and to let them into the full benefit of the property," citing several authorities.

It would be impossible to consider the circumstances surrounding the execution of the deeds under consideration without coming to the conclusion that they were intentionally fraudulent, at least as respects existing creditors ; and the case therefore falls within the above reasoning.

I also refer to 1 American Leading Cases, 1, where the learning on the subject of voluntary conveyances is elaborately developed in the notes to *Sexton vs. Wheaton*. At page 56 is the following language in reference to this point :

"In equity, if a conveyance is set aside by the prior credit-

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ors as being voluntary and fraudulent as against them, the whole settled estate becomes assets, and the subsequent creditors are entitled to come in upon the proceeds;" and he cites a list of six cases from as many different courts for the principle. Indeed, if there is a decided case the other way it has escaped my examination, and we are inclined to acquiesce in what seems to be supported by the weight of authority. In conformity with this view we hold that the property goes into the estate of the bankrupt for the benefit of the creditors generally.

We have expressed an opinion on this point because it seemed to be one of importance on the argument; but aside from this, we think that upon the facts of the case the subsequent creditors are to be let in on the ground that the settlement was made in contemplation of future debts. It has repeatedly been decided that in case of actual fraud as respects such creditors the deed will be declared void. *Chopin vs. Peare*, 10 Conn., 69; *Gunn vs. Butler*, 18 Pick., 248; *Reade vs. Livingston*, 3 Johns. Ch., 481; 1 American Leading Cases, 1; *Sexton vs. Wheaton*, *supra*; *Hinde vs. Longworth*, 11 Wheaton, 199.

If a voluntary conveyance is made with a view of becoming indebted, the fraudulent intent may be inferred from the fact that the grantor contracted debts immediately after he made it, and has not paid them. This circumstance is admitted in all the authorities already cited, besides many others, to be sufficient evidence of fraud against the persons with whom he incurred such debts, and to give them the undoubted right to have the deed set aside. There is some uncertainty as to what are the frauds of which subsequent creditors can take advantage, but the circumstance just referred to is admitted by all to be sufficient to establish the fraudulent intent.

Now, what are the facts here?

We have already seen that at the date of the conveyances a large portion of his scheduled liabilities had been contracted, and that his only property left was a stock in trade worth \$2,400. Shortly afterward he incurred debts to merchants in Baltimore in the aggregate of nearly \$2,500, apparently for goods in the way of his business, and in a period of less than four months his stock was reduced to the value of \$100,

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which, with the exception of a few articles of little value, constituted his whole property, and he claims it all as being exempt under the bankrupt-law. In the mean time he has paid \$400 prior debts, and gives no reasonable explanation of what has become of all his other property. We cannot accept a general statement that it had been consumed in support of his family in so short a time. Not a single debt incurred since the conveyance has been discharged, nor has his pre-existing indebtedness been reduced except to an inconsiderable extent. There is one circumstance in his testimony calculated to make an unfavorable impression: he declined to answer when and how he had disposed of his property. We barely state this, for it will not bear comment. Nor does he state any misfortune in business or other unusual occurrence by reason of which his means became so suddenly absorbed.

It cannot be supposed that a transaction so surrounded with evidence of turpitude can be either fair or honest. If a debtor has been deprived of the ability to meet his obligations, every dictate of practical justice requires that he should be able to explain the unfavorable events which have led to his embarrassment. If he puts his property beyond the reach of his creditors without any valuable consideration, the inevitable inference is that a secret trust was intended for his own advantage, which is utterly inconsistent with any valid title being passed, and the whole transaction will be set aside as against all parties intended to be affected by the fraud. We think the circumstances of this case conclusively show that the deed was directed against subsequent as well as prior creditors, and that it can, therefore, be avoided by both.

The remaining question is whether the transfer of the Ramsburg notes was also void as being made in fraud of creditors. The defendant, Lane, testifies that during the fall of 1871 he gave his wife the \$2,500 invested in these notes, and that he was then worth from \$23,000 to \$25,000 over and above all liabilities, and that his outstanding debts were not over \$500; and that there was also due \$1,000 to a building association which was a lien upon his property, and has since been paid by money borrowed from the Freedman's Savings and Trust Company, which loan was secured by a

prior deed of trust upon the same premises as those acquired by Mrs. Lane in the deed from said Ward.

His brother was examined as a witness, and testified that his brother John was worth about \$10,000 from 1870 to 1872 clear of all liabilities. Mrs. Lane, in her answer, avers that the money represented by the said notes was given to her in good faith two years previous to the institution of this suit, and over a year before the proceedings in bankruptcy. It is unnecessary further to examine the details of the proof, for they do not materially vary or contradict these statements.

Upon this showing, the case is manifestly a gift from Lane to his wife of the money in question at a time when he was in affluent circumstances, and his indebtedness quite inconsiderable when compared with his fortune, and having an ample fund left for the payment of what he owed.

Now, it is a well-settled principle of law that when a person is indebted in a small amount, and has ample means and is not embarrassed in his circumstances, he may make a gift in favor of a wife and children, and it cannot be impeached for want of consideration. This point has been expressly decided by the Supreme Court in the two cases, already referred to, of *Sexton vs. Wheaton*, and *Hinde vs. Longworth*. The same doctrine was re-affirmed in *Parish vs. Murphree*, 13 How., 92, where the court says, "to hold that a settlement of a small amount by an individual in independent circumstances, and which if known to the public would not affect his credit, is fraudulent, would be a perversion of the statute." Applying this principle to the case under consideration, it is quite clear that no fraudulent intent is proven as respects this gift. There is no proof that he contemplated any delay to his creditors in collecting the small amount he owed, and more than a year elapsed before he became insolvent.

We therefore think it was a gift made in consideration of love and affection by a party perfectly solvent at the time, and without fraudulent intent, and ought not to be set aside as void. That part of the decree which authorizes the complainants to receive and collect the said notes for the benefit of creditors must therefore be reversed for the reason just assigned, and the residue of the decree is affirmed.

**THOMAS MILLS vs. THE ORANGE, ALEXANDRIA
AND MANASSAS RAILROAD COMPANY.****AT LAW.—No. 9637.**

The defendant is a Virginia railroad-corporation, and had an agreement with a similar corporation in the District of Columbia, by which the defendant ran its trains over the track of the latter, into said District, and through the city of Washington, said trains being in the charge of the servants and agents of the defendants except the conductor, who was in the employment of the company whose track the defendant so used.

HELD, that the defendant is liable for a personal injury produced by carelessness on the part of defendant's agents in running a train of cars through the city of Washington on the track of the other company.

STATEMENT OF THE CASE.

The facts as they appear from the pleadings and testimony may be briefly stated. The defendant is a railroad corporation organized under the laws of the State of Virginia, and had an agreement with the Washington and Alexandria Railroad Company, which operates a road in the District of Columbia, to use the track of the last-mentioned company to run their locomotives and trains of cars from the city of Alexandria to the depot of the Baltimore and Ohio Railroad Company in the city of Washington, and that this track passed over and along Maryland Avenue in said city of Washington. That the defendant's trains of cars start from Lynchburgh, Virginia, and run direct to the Baltimore and Ohio depot in this city, carrying through-passengers both ways, north and south. At Alexandria a conductor of the said Washington and Alexandria Railroad Company is put on the train belonging to defendant, and continues on the train to the Baltimore and Ohio Company's depot in the city of Washington, and that all the employes of the defendant continue on the train except the conductor, who is an employe of the Washington and Alexandria Company. The trains stop about five minutes at Alexandria, and then run direct to

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the said depot under the exclusive control of such conductor, according to the time and regulations of the Washington and Alexandria Company; the employés all start with the train at Lynchburgh, and continue with it both ways, except the conductor, as above mentioned.

The plaintiff testified that he was employed for nearly a year previously to the occasion of the accident by the Washington and Alexandria Company; that his business was to go before the engines and carry a red flag between the Maryland Avenue depot and the Baltimore and Ohio depot; that he was to walk over the track directly in front of the engine and swing a red flag as the trains pass from one depot to the other.

That the defendant ran four trains a day over this track, and that he carried the flag before defendant's trains as he did before the others, and that he was in the employment of the Washington and Alexandria Company. That he carried the flag before defendant's train of passenger-cars on the 15th day of March, 1872, and had to run to get ahead of the train, which was running at the rate of five or six miles an hour, and that while he was on the track where he was required to carry the flag, the defendant's train of cars ran over him cutting his head and crushing his ankle and foot. This was between Sixth and Seventh streets in this city. That the conductor of the Washington and Alexandria Company was on the train as conductor at the time plaintiff was run over, and all the other employés on the train were the employés of the defendant.

He was cross-examined and said:

"When the cow-catcher hit me I fell on my side; I ran to get on the track in front of the engine so they would not run so fast; they were running five or six miles an hour; I was struck first on my heel and thrown down, and then my ankle was crushed; I was not trying to get on the cow-catcher at the time the train run over me; I did not attempt to get on at all; when I first got on the track I was more than a rod ahead of the engine; the train was running faster than it had a right to run; I believe the engineer run over me intentionally; I was trying to stop it; all the trains have to run as I walk; they are not allowed to go faster, and never have gone faster than I have walked."

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The plaintiff called two other witnesses and rested his case.

Whereupon the defendant, by his counsel, before offering any evidence on his part, moved the court to instruct the jury to return a verdict in favor of the defendant, on the ground that, upon the evidence before the jury, the plaintiff was not entitled to recover against the defendant, to which motion the plaintiff's counsel objected and insisted upon his right to present the case to the jury. But the court charged and directed the jury to render a verdict in favor of the defendant. To which instruction and direction the plaintiff, by his counsel, excepted. The only question upon the bill of exceptions is, whether the action should not have been brought against the Washington and Alexandria Company instead of the defendant.

William B. Hawes for plaintiff:

I.

In this case, the court held that the plaintiff had sued the wrong company; that the action should have been brought against the Washington and Alexandria Company. This was error. Whether the plaintiff had or had not selected the proper party, was a question of fact for the jury to determine from the testimony. It is a proposition well settled that a court cannot refuse to allow the jury to pass upon the evidence, no matter how slight that evidence may be. The plaintiff was entitled to have his case considered by the jury.

The following, among the numerous authorities on this subject, will settle this question: *Drukley vs. Gregg*, 8 Wall., 242; *Vichman vs. Jones*, 9 Wall., 197; *Anderson vs. Cape Fear Steamboat Company*, 64 N. C., 339; *Henry vs. Rich*, 64 N. C., 379; *Waugh vs. Ridgeway*, 42 Ala., 398; *Barney vs. Schneider*, 9 Wall., 248; U. States Digest, N. Series, vol. 1, p. 705, sec. 98.

II.

In this case the defendant used the track of the Washington and Alexandria Company to run its cars through the city of Washington. The plaintiff was a servant of the Washington and Alexandria Company, and may therefore

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recover for the negligent management of the defendant's train of cars. *Sherman and Redfield on Negligence*, 126 and 127; 27 Vermont, 370; 8 Allen, Mass., 441; 49 Penna., 186; Red. on Negl., p. 15, sec. 13.

III.

Where one railroad company uses the track of another similar corporation on which to run its cars, such company must be held to observe all such precautions as are required by the corporation whose track such company uses. *U. S. Digest, New Series*, vol. 1, p. 626, sec. 112; *Webb vs. Portland Railroad Company, Me.*, 117.

IV.

In this case, the plaintiff was required, by the Washington and Alexandria Company, to carry a red flag in front of all engines that passed over its road. This requirement was not only a rule of its road, but was required by the laws of the District of Columbia. *Webb's Digest of Laws*, 474, sec. 6.

It is now a settled rule of law that when one company runs its train over the road of another company, the first company is responsible for the entire route. *Redfield on Railways*, vol. 2, 277; *Railway Company vs. Barron*, 5 Wall., 90; *Ayles vs. Southeastern Railway Company*, Law Rep., 3 Exch., 146.

R. T. Merrick for defendant.

Mr. JUSTICE WYLIE delivered the opinion of the court:

This action was brought by the plaintiff to recover damages for an injury produced by carelessness on the part of the defendant's agents in running a train of cars by which he was knocked over and one of his feet crushed.

The accident happened within the limits of the city, and on the track of the Washington and Alexandria Railroad Company.

At the close of the plaintiff's evidence-in-chief, the court

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instructed the jury to find a verdict for the defendant, on the ground that if the plaintiff was entitled to recover damages at all, it must be from the Washington and Alexandria Company, and not from this defendant, to which ruling of the court the plaintiff excepted.

(The evidence on behalf of the plaintiff will be found in the preceding statement of the case.)

The ground upon which the court held that the defendant was not liable, consisted of the single fact that between Alexandria and Washington "the entire train was exclusively under the control of the conductor of the Washington and Alexandria Railroad Company, running exclusively according to the time and regulations prescribed by the Washington and Alexandria Company, and not subject to any other control."

The train, however, was a through-train from Lynchburgh to Washington, was owned and run by the defendants, and all the officers and servants upon it except only the conductor, whose duties began at Alexandria and terminated here, were those of the defendant. There was no evidence to show that this conductor had given any directions to the engineer as to the rate of speed to be given to the train, at or before the time of the accident, or had assumed to interfere with him in any manner. There was evidence tending to prove that the train was going at a greater rate of speed than it had a right to run, and that the accident was the result of misconduct on the part of the engineer alone. (See plaintiff's evidence on cross-examination.) In some respects the duties of the conductor of a train are like those of the master of a ship; and those of the engineer resemble those of the pilot. The time of starting, the points at which to stop, the collection of fares, and the general control as to the rate of speed, belong to the conductor. But the duty of vigilance to avoid danger, the control of the engine, and the post of outlook against accidents, belong to the engineer. Should the order of the conductor be that the train be run at a certain rate of speed, it would be the duty of the engineer to comply with such order; but it is, on the other hand, also the duty of the engineer so to obey the order as that acci-

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dents shall be avoided, and to this extent his authority is paramount to that of the conductor.

In the present case there is no evidence tending to prove the slightest negligence on the part of the conductor. If there was negligence anywhere, it was the negligence or misconduct of the engineer which caused the injury to the plaintiff.

This brings us to the point as to which of these two companies the engineer was the servant or agent of at the time it happened. And on this point there exists no doubt upon the evidence. The train itself was that of the defendant; and the engineer and every other person employed were paid by the defendant, except only the conductor who had come upon it at Alexandria. The accident was the result of no neglect of duty, if any such neglect existed anywhere, on the part of the conductor, but solely on the part of the engineer. It follows that the liability, if any, falls upon the defendant, in whose service he was at the time.

Judgment reversed, and a new trial awarded.

HENRY FRIES vs. EVA FRIES.

IN EQUITY.—No. 2734.

- I. A final decree passed at a special term of the court in equity cannot be opened, set aside, modified, or altered after the lapse of several terms of that court upon a mere petition supported by *ex-parte* affidavits, and upon notice to the adverse party.
- II. A decree is deemed to be enrolled as of the term at which it is passed, and a final decree cannot be opened after the expiration of such term, except upon bill of review. A proceeding by petition and *ex-parte* affidavit is not equivalent to a bill of review.
- III. A final decree in a divorce suit in reference to alimony is not subject to alteration or revision on *ex-parte* affidavits, unless it is provided in such decree that either party be at liberty to apply thereafter to the court for a modification of such decree in respect to alimony.

STATEMENT OF THE CASE.

This was a suit for divorce, and on July 25, 1873, at a special term in equity, a final decree was passed divorcing the parties from the bonds of matrimony, and decreeing further, with the written consent of counsel, that Henry Fries convey to Eva Fries a certain house and lot in this city, upon said Eva Fries paying or causing to be paid to him the sum of five hundred dollars within ninety days from the date of the decree.

On November 11, 1873, two special terms having intervened, and the said money not having been paid or tendered, a simple petition was filed on behalf of Eva Fries, asking that the time for the payment of the same be extended, which was opposed on the ground that it was not competent for the court to open a final decree after the lapse of several terms of court upon a simple petition, and also on the merits upon affidavits filed.

An order, however, was passed and signed on the 25th November, 1873, as follows:

“This cause coming on to be heard on the petition of the complainant for an extension of the time in which she was

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required to pay the defendant \$500 as condition of the transfer to her of the property named in the proceedings, on consideration thereof it is this day ordered that the time of making said payment be extended for sixty days from this date, and the time for the execution of the deed provided for in the former decree herein be also extended for sixty days from this date, and the said original decree be continued in force till the expiration of said sixty days."

From this order Henry Fries appealed to the general term.

S. R. Bond and *J. J. Johnson* for Henry Fries, in support of the appeal, submitted :

First. The order undertakes to open a final decree and to substitute itself as an essential part of it, and is appealable.

Second. In the courts of this country a decree is deemed to be enrolled as of the term at which it is passed, and a final decree cannot be opened after the expiration of such term except upon a bill of review. Story's Eq. Pl., 5th ed., §§ 403, 404; Cooper's Eq. Pl., p. 89; Spence's Equitable Jurisdiction, &c., vol. 1, p. 394; Smith's Chancery, vol. 2, p. 48; *Jenkins vs. Eldredge*, 3 Story's R., 199; *Whiting vs. Bank of the United States*, 13 Peters' R., p. 6; Equity Rules of Court, 81 and 87.

Francis Miller for Eva Fries.

Mr. Justice OLIN delivered the opinion of the court:

The first ground of opposition to the motion to open the decree or modify it presents the simple question whether a justice holding the equity court may, after the lapse of several terms of that court, upon petition supported by *ex-parte* affidavits and upon notice to the adverse party, open, set aside, modify, or alter a final decree of that court. We think not. If otherwise, then one of the justices of this court who happens to hold a term for the month of November may, on petition or *ex-parte* affidavits, modify, alter, or reverse all the decrees passed by his predecessor at the October term. Nay,

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more, he can in the same way reverse all orders and decrees passed by the justices holding the special term for the trial of causes in equity since the organization of this court. This we think is not the mode prescribed by law for reviewing orders or decrees passed by a justice holding the special term. It would be a novel practice for a justice holding the special term to be constituted a kind of appellate court, and sit to review not only his own judgments, orders, or decrees during the term at which they were made, but upon petition and *ex-parte* affidavits, review the orders, judgments, and decrees passed at some preceding term.

By the rules of the court of chancery in England, when a decree of that court was enrolled it could not be reversed, modified, or altered but by a bill of review, which in legal effect was a retrial of the suit; a bill of review at that time being almost the only remedy to correct any error made by the chancellor—no appeal being allowed at that time from his orders or decrees. But as decrees of a court in chancery are not actually enrolled in this court, a decree is deemed to be enrolled as of the term at which it is passed, and a final decree cannot be opened after the expiration of such term except upon bill of review. See Story Eq. Pl., §§ 403 and 404; Cooper's Eq. Pl., p. 89; *Whiting vs. Bank of the United States*, 13 Peters, 1 and 6.

If such was the practice of the court of chancery in England, and deemed wise and salutary, and over whose orders and decrees there was no appellate supervision although the chancellor held the equity court for as many years as did Lord Eldon, how much more is the observance of some such rule imperative in a court constituted like this, in which a new chancellor may appear every month in the year save one.

It is of no moment that the modification of the original decree was made by the same justice who passed it. Some rule must be had on this subject of universal application. Few will contend that a justice holding the October term of the court could upon *ex-parte* affidavits alter, modify, or reverse a decree passed by another justice at a preceding term. We must either, therefore, adopt the rule we have indicated, or adopt the rule allowing any justice who hap-

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pens to hold the equity court or special term to look back through the records of the court, and upon *ex-parte* affidavits vacate, modify, or alter his own decrees whenever passed.

On the argument of this appeal, while it was conceded that a decree after enrollment or what is equivalent thereto, after the lapse of the term at which it was passed, could not be opened except by bill of review, it was, however, claimed that the proceedings on the petition were equivalent to a bill of review. This is not so; the proceedings had on this petition have no analogy to a bill of review. A bill of review is a retrial of the cause at least upon those points sought to be established in order to vacate or modify the decree. The proceedings upon this petition were wholly founded on *ex-parte* affidavits, a kind of testimony the law abhors, and never resorts to except in case of necessity. It was suggested on the argument that the modification of this decree was in reference to alimony, and that that matter was always under the control of a court of equity. This doubtless is so during the pendency of the suit, but after a final decree it is no longer subject to alteration or revision on petition or *ex-parte* affidavits any more than is the divorce itself, unless, as is often provided in the final decree, either party be at liberty thereafter to apply to the court for a modification of such decree in respect to alimony.

The order, we think, should be reversed.

MARY R. CHICHESTER vs. UNION TRANSFER COMPANY.

AT LAW.—No. 10,376.

The right of action for a tort to the person dies with the person injured.

STATEMENT OF THE CASE.

The plaintiff sues the defendant in an action of tort for an injury caused by the defendant in driving a baggage-wagon against her, by which she was knocked down and her collar-bone and leg broken, and she was otherwise greatly injured. The accident happened on the 3d day of October, 1872, in the city of Washington, and District of Columbia.

The defendant interposed the general issue, and a special plea; and subsequently at the special term in May, 1873, the death of the plaintiff was suggested. At the succeeding special term in October, the defendant moved the court to dismiss the suit. That motion was resisted and overruled, and from the order overruling the motion the defendant appeals.

H. D. Claughton and Francis Miller for plaintiff.

Stanton & Worthington for defendant.

By the COURT:

There is no statute in force in this District changing the common-law rule, that the right of action growing out of an injury to the person dies with the person injured. The order appealed from must be vacated and the suit dismissed.

MARIE A. N. POLLARD vs. JACOB E. LYON.**AT LAW.—No. 7961.**

- I. On the trial of an action of slander the plaintiff must prove that the defendant uttered the words set out in the declaration, or expressions of substantially the same meaning.
- II. Words which if true would subject the plaintiff to an indictment for crime involving moral turpitude, are in themselves actionable without averment or proof of special damage.
- III. Since the act of Maryland of 1749 removing the infliction of corporal punishment for fornication, and that of 1786 repealing all proceedings against that offense, words spoken of an unmarried woman imputing to her that act are not actionable in themselves.
- IV. When the words complained of in the declaration are not actionable, and no special circumstances are set up, and there is a verdict in favor of the plaintiff, the judgment will be arrested.

STATEMENT OF THE CASE.

This is an action of slander, and the words alleged in the first count of the declaration to have been spoken by the defendant of and concerning the plaintiff are, "I saw her in bed with Captain Denty;" and in the second count, "I looked over the transom-light and saw her in bed with Captain Denty." There was no averment that the plaintiff was a married woman, nor was there any statement of special damage, or that the defendant had charged the plaintiff with adultery. At the trial of the case the court charged the jury that they "ought to find a verdict for the defendant unless they are satisfied from the proof that the defendant used of and concerning the plaintiff the words set out in the declaration, or language substantially identical; and evidence showing that the defendant had spoken the precise language in the declaration, or that he had caught her in bed with Captain Denty, or that she was in bed with Captain Denty, or that he accused her of being in bed with Captain Denty, may properly be considered by the jury for the purpose of sustaining the declaration, as in the opinion of the court such expressions are substantially like those in the declaration. But, on

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the other hand, evidence to the effect that defendant only said to the witness that he had caught them together, or caught her with him, or had seen her with him, or had seen her in Denty's room, are not competent to be considered by the jury as proof of the alleged slander, for they do not conform to the words set out in the declaration." This instruction was given as a substitute for that asked for by defendant's counsel, who excepted to the same. The jury returned a verdict in favor of the plaintiff for the sum of \$10,000. A bill of exceptions was made, and a motion in arrest of judgment, on the ground that the words complained of in the declaration are not actionable, and because the declaration does not state a case entitling the plaintiff to a recovery; and, therefore, judgment cannot properly be entered on the verdict.

The case is now here on the bill of exceptions and the motion in arrest of judgment, which was ordered to be heard at the general term in the first instance.

Drew and J. H. Bradley, jr., for plaintiff.

Davidge and Cox for defendant.

Mr. Justice HUMPHREYS delivered the opinion of the court:

We think that in the ruling of the circuit judge there was no error.

The motion in arrest of judgment is heard in general term now in the first instance. The words spoken by the defendant and charged in the declaration are, "I saw her (the plaintiff) in bed with Captain Denty." It has been settled that, at common law, words which if true would subject the accused to infamous punishment, or to an indictment for a crime involving moral turpitude, are in themselves actionable without averment or proof of special damage. The rule must have been so settled on the ground that, as between men, a charge made by one against another could result in no serious injury, as a general rule, unless the charge if true would subject the party of whom the words were spoken to the incon-

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venience and danger of an indictment in which the public would be arrayed against him. It may be true that a man suffers no real damage from words which, if true, would not and could not be followed by an indictment and punishment. Be the reason what it may, we find the rule and cannot depart from it. Rude as the generation that established the rule may be thought to have been, it probably did not occur to them that the same rule would come to be applied in a more refined age so as to protect the defamer of woman's character from responding in damages for the looseness of his tongue. Or it may not have entered the mind that the time would come when men could wantonly assail the reputation of woman's chastity. But we are bound by the stubborn rule of authority, and the remedy is by legislative action.

The words in this case import nothing else, legally or according to the common acceptation of those words, than a modest way of charging illicit intercourse between a man and a woman. The more delicate and covert the charge, the keener the injury. When the defendant said, "I looked over the transom-light and saw Mrs. Pollard in bed with Captain Denty," who would doubt his meaning? If the charge was true, defendant could have justified; if untrue, he should be held to answer for the wrong committed. It is to be regretted that the rule in Ohio and Iowa is not the rule of the common law in governing us.

But we are bound by the rule that the charge must be in words which, if true, would subject the accused to an indictment. There is moral turpitude in the charge made; but the plaintiff could not be indicted even if the truth of the charge was established. The act of Maryland of 1749 removed the infliction of corporal punishment for fornication, and the act of 1786 repealed all proceedings for the punishment of fornication. We think that we are forced, however reluctant to do so, by the mandate of authority, to arrest the judgment.

Eastwood vs. Carrington.

MARVIN EASTWOOD vs. EDWARD C. CARRINGTON.**AT LAW.—No. 10269.**

C. executed a deed of trust on real estate to secure a note for \$1,000. He afterward conveyed the premises in fee to G., whom he alleges verbally agreed to assume the incumbrance. The plaintiff subsequently purchased the premises at auction without being informed of said agreement, and conveyed to B. with covenants of warranty; and in order to protect the title of his vendee, purchased the note in question and brought this action thereon against C. Held, that the equities between C. and G. furnished no defense against the present plaintiff.

L. G. Hine for plaintiff.

Carrington & Carrington for defendant.

Mr. Justice WYLIE stated the case and delivered the opinion of the court:

This is an action upon a promissory note for \$1,500, made by the defendant and payable to Mrs. Annie E. Brent. The note was secured by deed of trust made by the defendant upon lots 19, 20, 24, and 25 in Carrington and Hughes subdivision of square 234 in this city. Mrs. Brent having died, the note and security passed to the executor, John Carroll Brent, from whom it was purchased by the plaintiff after maturity. The defense set up at the trial was that the note had been paid and satisfied; not that it had ever been paid to Mrs. Brent in her life-time, or to her executor after her death, nor even to the present plaintiff since its purchase by him from the executor, but that it had been satisfied in law because the defendant had had dealings with several other parties who ought to have paid it on his account according to their contracts severally with him, one after the other, in succession. Indeed, the defendant claims that in this way the note has been already paid three times over, and if he

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should fail in his defense in the present action he will be obliged to pay it once more. And he makes it out in this way: first, he sold the lots on which he had given security for the note, to one Benjamin F. Gilbert for \$1,500 less than their value, because of this incumbrance, and this was payment No. 1; second, Gilbert, having got the property from the defendant at such reduced price, and agreed to pay off the incumbrance, and failed to meet his contract in this as well as other respects, this amounted to payment No. 2; third, that the present owner of the lots is one Browne, who derives his title through several mesne conveyances from the said Gilbert, and that this Browne is justly indebted to the defendant in a sum larger than the amount of this note, and, therefore, ought to pay off the incumbrance upon the property, and this is payment No. 3.

According to this pretension if Browne should, in his turn, sell the same property to some other person who is indebted to the defendant in like amount, that would be payment No. 4; and so the progression might be continued as long as the successive purchasers should, on any account, be debtors of the defendant, and yet the holder of the note never be paid. Notwithstanding all these "payments," no money of the defendant has ever reached the hands of either Mrs. Brent, in her life-time, or of her executor, or of his indorsee since; nor is it pretended that either of these parties has ever had a place on the list of defendant's debtors so as to afford him the benefit of a set-off against the note. Whatever disappointments the defendant may have met with in his dealings with Gilbert and his successors, they furnish no defense in the present action.

In examining the record in this case, we have met with some difficulty in clearing it of the surrounding circumstances, and what the works on logic call its accidents, which have no bearing on the issue to be decided, but serve only to embarrass investigation. Divested of all such matter, and of its attendant verbiage, the present case, we believe, is only what we have presented.

Judgment affirmed with costs.

Application of Rufus S. Merrill for re-issue of Patent.

IN THE MATTER OF THE APPLICATION OF RUFUS
S. MERRILL FOR RE-ISSUE OF PATENT No. 28,762;
GRANTED JANUARY 19, 1860, FOR IMPROVEMENT
IN LAMPS.

- I. Where a claim was for a flange around and in a plane with the top of a lamp-wick tube, and a prior patent described a like flange "*at or near*" the top of the tube, but showed it in drawing and model a trifle below the top. Held, that the patent anticipated the claim, although the purposes or effects of the flanges respectively declared by the claimant and patentee were different.
- II. If two inventions are substantially the same in fact, whatever may be claimed by either party in *effect*, in contemplation of patent-law they are one.
- III. It is not purpose or results that are the subject of patent, but the instrumentality, contrivance, or machinery through the agency of which results are effected.

STATEMENT OF THE CASE.

This was an application of Rufus S. Merrill for re-issue of patent No. 28,762, granted January 19, 1860, for improvement in lamps. The Commissioner rejected the application on the ground that the alleged improvement had been anticipated by a patent granted to Hale & Chandler March 1, 1859. The invention is described in the opinion of the court.

A. Pollok and M. Bailey for appellant.

Marcus S. Hopkins for the Commissioner of Patents:

The only difference between the two devices, if there be a difference, is in the position of the flanges on the wick-tube, as shown by the respective drawings and models. Merrill shows his flange at the top of the wick-tube, and Hale & Chandler *near* the top—about one-sixteenth of an inch below it—in their model. But they direct in their patent that it is to be put "*at or near the top.*" Whether or not the effect would be materially different with the flange one-sixteenth.

Application of Rufus S. Merrill for re-issue of Patent.

of an inch from the top instead of at the top is, perhaps, questionable, and I have, at present, no means of determining. But, admitting that it would be different, the question for the court is whether the words "*at or near*," in the patent of Hale & Chandler, did not mean *at* the top as well as *near* the top of the wick-tube. No argument can aid the court in deciding this. Patents are to be construed liberally. *Parker vs. Stiles*, 1 Fish., P. R. If the devices be held to be practically the same in construction and position, and it be thought that Merrill was seeking a different object or effect, which Hale & Chandler did not contemplate, then I submit this is immaterial; that Hale & Chandler are entitled to all the benefits of the operation of their flange in the position they specified, whether they understood and contemplated them when they made their invention or not. The discoverer of the fact that, when applied "*at*" the top of the tube, as their patent specified, instead of *near* the top, the flange produced a better effect, was not an inventor of a new device, but the mere discoverer of a function of an existing device. *Morton vs. New York Eye Infirmary*, 2 Fish., 320.

The case resolves itself into this question: When one man has a patent for employing a flange "*at or near*" the top of a lamp-wick tube, can another man properly be granted a patent for employing a like flange *at* the top of a like lamp-wick tube in the same manner, to be used in the same way, because he sets up a different reason for doing it, or a different theory of its effect? If Hale & Chandler should come into the Office now with a re-issue application, and claim the flange "*at or near*" the top of the tube, such a claim, according to the established practice of the Office, would be granted them, (Commissioner's Decisions for 1870, p. 170,) because that is the invention actually set forth by them in their patent. *O'Reilly vs. Morse*, 15 Howard; *Battin vs. Taggart*, 17 Howard; *Hussey vs. McCormick*, 1 Fish., 509.

CARTTER, Ch. J., delivered the opinion of the court:

This is an appeal from the decision of the Commissioner of Patents rejecting an application for the re-issue of patent

Application of Rufus S. Merrill for re-issue of Patent.

No. 28,762, granted to Rufus S. Merrill, January 19, 1860, for an improvement in lamps.

The invention is a flanged lamp-wick tube.

The flange is placed on the tube, or made a part of it, and extends around its mouth in the plane of its top. The object of employing it in this position, as stated in the application, is to deflect the ascending current of air which supports combustion, and cause it "to impinge at an angle upon the flame, to produce more perfect combustion." The appellant claims, "in flat-wick lamp-burners, of otherwise ordinary or suitable construction, a laterally projecting deflecting-flange, adapted to the top or mouth of the wick-tube, and constructed substantially as described, to operate in the manner and for the purpose set forth." This claim was rejected by the Commissioner upon the patent of Hale & Chandler, No. 23,085, granted March 1, 1859, which shows a like flange placed upon a flat lamp-wick tube, as the patent describes, "*at or near the top of the wick-tube,*" for the purpose "of equalizing the aerial current as it passes upward toward the flame," and making "the flame more even and uniform." The model and drawing of this patent show the flange a trifle below the top of the tube. Nothing is said in either of the patents, or in the re-issue application under consideration, with reference to the width of the flange employed, although it is obvious that its effect in deflecting the ascending current of air depends about as much upon its width as upon its position.

The object sought by both patentees in the use of the flange was to obtain a better light; but their explanations how and why the flange improved the flame were different. Hale & Chandler said it equalized the ascending air-current and made the flame more uniform; while Merrill has another hypothesis—in fact, two others. In his original patent he said :

"This my improvement relates to coal-oil burners, constructed in such a manner as to impel the vapors generated in the oil-reservoir, and issuing therefrom, to mingle with a current of air, and to impinge upon the flame, and thus supply it with the quantity of oxygen requisite to consume entirely the hydrogen and carbon of the oil and vapor decomposed

Application of Rufus S. Merrill for re-issue of Patent.

by heat, and thereby avoid the production of smoke and increase the brilliancy of the light, without, however, augmenting the consumption of oil."

In his re-issue application he says the "main point" is:

"That the ascending current shall be deflected away from the base of the flame and caused to impinge upon the flame at a point higher up. The flange constitutes a shield or barrier which surrounds the base of the flame, and the air must pass outwardly around this obstacle before it can reach the flame, and is consequently compelled to strike the flame at a point above its base."

The latter explanation is probably the true one, and it no doubt sets out the most important function of the flange. But there is nothing in either of the patents before us to show that this was originally contemplated or understood by either of the patentees. The solution of the issue herein is to be found in the naked statement of the case. The improvement of Merrill, sought to be re-issued, was anticipated by the patent granted to Hale & Chandler March 1, 1859. The specification of Hale & Chandler, enlightened by their model, makes their earlier invention identical with the subsequent invention of Merrill. It is true that each declares a different purpose in the result of their respective inventions. And perhaps if the claim of different and distinguished results was to control the subject, the applicant might be entitled to a re-issue.

It is not purpose or results that are the subject of patent, but the instrumentality, contrivance, or machinery through the agency of which results are effected.

It is an axiom in mechanics and mathematics, and a self-evident truth of universal application, that the same causes produce the same results. If, therefore, the two inventions are substantially the same in fact, whatever may be claimed by either party in effect, in contemplation of patent-law they are one as a necessary and legal consequence.

The subsequent invention of Merrill must yield to the prior patent of Hale & Chandler.

It is the judgment of the court that the decision of the Commissioner is right, and it is therefore affirmed.

**GEORGE HILL, JR., vs. EDWARD SHOEMAKER AND
THE FARMERS AND MECHANICS' NATIONAL
BANK OF GEORGETOWN.**

IN EQUITY.—No. 3214.

- I. The sale of real estate under a deed of trust as a whole, when it is capable of being divided, and when serious injury has been occasioned by that way of selling, furnishes just ground for relief in a court of equity.
- II. If the property has been consolidated and improved into a paper-mill (after the deed was made) with fixed machinery and water-power to operate the same, the sale will be set aside if it is made without reference to this altered condition of the property.

STATEMENT OF THE CASE.

The bill is filed in this case to set aside a sale of lands under a deed of trust, for the reason that separate lots were sold in mass, and without respect to certain improvements and water-privileges, in consequence of which the premises sold for a grossly inadequate price.

The lots are in the city of Georgetown, two of them fronting 23 feet each on Water street, with a depth of 61 feet; the third, which adjoins the two preceding ones, fronts $19\frac{5}{12}$ on Potomac street and has a depth of 71 feet; and the next, which adjoins the last one on the north, fronts 71 feet on Potomac street with a depth of 71 feet. The complainant alleges that he conveyed said parcels of land on or about the 15th day of January, 1864, in distinct parcels to the defendant Edward Shoemaker, upon certain trusts to secure the payment of three promissory notes, each for the sum of \$2,210,33 $\frac{1}{2}$, payable respectively in one, two and three years after date, which notes were payable to the order of Judson Mitchell and other trustees of the late Farmers and Mechanics' Bank.

That the object of the complainant, as both defendants well knew, in making such purchase, was to establish upon the lots a paper-manufactory; that at the time of said purchase there was no water-power annexed to or belonging to said property; that after his said purchase thereof, the plaintiff,

after much trouble and negotiation and the payment of a bonus of \$1,000 in cash, obtained from the Chesapeake and Ohio Canal Company a grant of the privilege and right to 200 cubic inches of water for the purpose of propelling machinery upon the property so purchased, at and for the yearly rent of \$500 for the use of said water; and after several years occupied in litigation, and the expenditure of large sums of money, the complainant succeeded in obtaining the right and privilege of the use of 217 inches of water from said company upon said property, but upon the payment of a bonus of \$1,045 in cash and the yearly rent of \$2.50 per inch of said water, making the total water-power available upon said property 417 cubic inches, at the annual rental of \$1,042.50; that to make said water available upon said property the plaintiff was obliged to expend large sums of money to effect the proper conduct of the water to the said property, by means of the fore-bay and head-race, and also *from* the said property, after the power of said water had been availed of, to the Potomac River by what is called generally the "tail-race"—the length of each race being about three hundred feet; that upon this work, as well as arranging the property for the purpose of a paper-mill, the plaintiff expended large sums of money, at least to the amount of thirty thousand dollars.

That said defendant bank, who had become owners of said notes, and claiming that the same were overdue and unpaid, caused the said defendant Edward Shoemaker to advertise said property for sale under the said deed of trust aforesaid. Said advertisement does not describe the property to be sold in the *four* separate and distinct parcels as described in said deed, but publishes and announces the same as one, and the public are advised by such advertisement that the *whole* property would be sold together, greatly to the disadvantage of plaintiff. That the plaintiff requested the bank and said Shoemaker to sell the property in parcels, which they refused to do, and that the bank became the purchaser for \$7,000. The said complainant, in the notice requesting the property to be sold in parcels, states his object as follows:

"My object is to have the two southern parcels with the buildings to sell as well as possible; and my belief is these

alone will sell for much more than sufficient to pay the debt, expenses, &c., because I am the owner of the water-power, (amounting to 200 horse-power,) which is not covered or embraced in the deed of trust, and I propose to distribute this power, allowing 66 horse-power to each of the southern parcels, which will enhance greatly the value of these parcels.

“The wheel-pit with two wheels is located upon the central (19 5-12 feet) parcel above mentioned, and I expect to retain this so as to furnish the water-power above mentioned to whoever may become the purchaser.”

The bank and Edward Shoemaker answer, stating the amount due, the various attempts at settlement, the sale of the premises together, and the request of the plaintiff to sell them in separate parcels. The following is extracted from Shoemaker's answer:

“7. I charge and allege that I did exercise a sound and reasonable discretion in the manner of the sale of said real estate, and for the following considerations: I was advised and did believe and do allege that the machinery was not included in, and could not be sold by me under said deed of trust; that I could not, either under said deed of trust or as the agent of said plaintiff, sell the said water-privileges, and that any representations as to the distribution of said water-power made to encourage the purchase of separate parcels would have been false and fraudulent; that the debt due and to be collected under said deed of trust, and the expenses of sale and other charges, amounted to about the sum of seven thousand (\$7,000) dollars; that the premises were originally sold, in the year 1863, to said plaintiff for the sum of eight thousand one hundred and thirty-one (\$8,131) dollars; that the same had been re-arranged and made suitable for the purposes of a paper-mill, and were thereby unfitted for other purposes, and could only be applied to other uses at great expense, and that the buildings, being very old, had much depreciated in value since the purchase by said plaintiff, and that the subject to be sold by me was barely sufficient in value to realize, in a sale thereof, the amount of the principal debt and interest due and the cost and charges of the sale; and I do allege that the amount for which the premises were sold to the said *cestui que trust*, to wit, the sum of

seven thousand (\$7,000) dollars, is more than they are reasonably worth, after the damage caused by the removal of the machinery and water-power therefrom."

The complainant's witnesses testify that the property in question is susceptible of division, and that each parcel would have a specific value, and that for manufacturing purposes, with the right of using the water-power, the premises are worth from \$40,000 to \$80,000; and independently of the water-power they would be worth from \$4,000 to \$6,000. The plaintiff estimates the expense he incurred in getting the water-power and machinery into the building at \$30,000.

W. D. Davidge and Fred. W. Jones for plaintiff:

I. Deed of trust is in substance a mortgage, with specific provisions for foreclosing or barring the equity of redemption. *Woodruff vs. Robb*, 19 Ohio R., 212, in which case the subject is treated very fully.

II. Trustee is bound to act in good faith, and take care of and look to the interest of both parties in the execution of the power. "Trustees should consider themselves impartial agents for both parties, and act in all sales for the interest of the debtor as well as the creditor." If a discretion is left with him, he must exercise it in a reasonable manner; otherwise the sale will be set aside, or he be personally responsible. *Richardson vs. Holmes*, 18 Howard, 147; *Johnson vs. Eason*, 3 Iredell Eq., 336.

He should not permit the creditor to force the sale at an inadequate price in the absence of other bidders, and should postpone the sale, if necessary, to obtain a fair price. *Johnson vs. Eason*, 3 Iredell Eq., 336; *Quarles vs. Lacy*, 4 Munf., 251; *Rossett vs. Fisher*, 11 Gratt., 492; *Lane vs. Tidball*, 1 Gilmer, 132; 11 Lehigh, 556; *Singleton vs. Scott*, 11 Iowa, 589, 597; *Jenks vs. Alexander*, 11 Paige, 619; *Outwater vs. Barry*, 2 Halst. Ch., 63; *Richardson vs. Holmes*, 18 How., 143.

Not only must he act in good faith, but he must use every requisite degree of diligence to bring the property to sale under the best possible circumstances. *Mathie vs. Edwards*, 2 Coll., 465, where the vice-chancellor says: "Mortgagee cannot exercise power of sale in manner merely arbitrary, but is bound to exercise some discretion, * * * and act

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with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be obtained under the circumstances."

The mortgagee becomes the trustee of the debtor, and is bound to act *bona fide* and to adopt all reasonable modes of proceeding in order to render the sale the most *beneficial to the debtor*. Ch. J. Shaw in 3 Metcalf, 311. (See *Hobson vs. Bell*, 2 Beav., 17; *Goldsmith vs. Osborne*, 1 Edw. Ch., 561.)

For power of equity to control discretion, see 36 Miss., 495; *Prewett vs. Land*, 11 Gratt., 348; and Hill on Trustees, 715, 725.

III. Sales "should be watched by the courts with a jealous eye, and should not be sustained unless conducted with all fairness and integrity." Caton, J., in 15 Illinois, 507.

Upon the slightest proof of fraud or unfair conduct, they will be instantly set aside. *Longworth vs. Butler*, 3 Gilm., 32, 44; Ch. J. Taney in *Bronson vs. Kinsie*, 1 Howard, 321; Vide also 11 Barb., 191; 10 Iowa, 408.

Charles M. Matthews for defendant Shoemaker:

I. The real estate when purchased by appellant was treated and considered by him and settled for as one piece of property; and its separate character was not contemplated in the power of sale contained in the deed of trust.

II. No damage by reason of excessive advertisement. The deed of trust required advertisement in one newspaper, which might have been made daily; advertisement was made on alternate days in two daily papers and twice in a weekly paper published in Georgetown, the place of location of property to be sold.

III. The consideration of the request that the real estate be sold in parcels was that appellant would distribute the water-power owned by him to the different parcels sold.

Under the leases and agreements with the Chesapeake and Ohio Canal Company appellant could not thus apportion or distribute his water-privileges, nor is he rightfully possessed of the water-power claimed by him in this request.

IV. A sale made by trustee and accompanied with repre-

sentations in regard to water-power would have been false and deceptive.

V. Neither machinery nor water-power being included in the deed of trust, three very old houses, built early in this century, defaced by use as a paper-mill, specially prepared for its machinery and to be damaged by its removal, and which sold in 1863 for \$8,131, before the machinery or water-power were introduced, were bought at sale made by appellee, Shoemaker, for \$7,000. This was a reasonable and fair price for the property.

CARTTER, C. J., delivered the opinion of the court, to the effect following:

In this case the court have unanimously come to the conclusion that the sale should be set aside. The reason stated in the bill for setting aside the sale is, that it took place under a deed of trust, and that the property, which consisted of four lots of ground, was sold collectively when it should have been sold in parcels. The sale of trust-property as a whole when it is capable of being divided, and when serious damage has been occasioned by selling in that manner, furnishes just ground in a court of equity for relief. But this does not constitute the gross error of the sale in this case. At the time the deed of trust was executed, the buildings upon the premises consisted of two brick warehouses and a dwelling-house. The complainant placed in these structures at great expense all the machinery necessary to a paper-mill, and procured from the Chesapeake and Ohio Canal Company a water-power, which he conveyed under ground some three or four hundred feet to the mill-property, for the purpose of operating the machinery, and also incurred heavy expense for an underground tail-race to conduct the water away. He estimates that he has expended thirty thousand dollars on these objects. The property thus improved and consolidated was, according to the uncontradicted testimony, worth from \$40,000 to \$80,000. The great mischief done by the sale, as we think, was, not in selling the lots together, but in selling them without reference to the fixed machinery and water-power connected therewith. The result is that for \$7,000 this valuable

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mill-property has been destroyed. The machinery and water-power of the mill have been rendered worthless. We are governed in our conclusion in setting aside this sale by the fact that both parties had a right to permanent improvements upon the premises, so far as the same were inalienably fixed thereto, and that there was no exclusive right of either to separate or divide them.

Under the prayer for general relief, we think the sale ought to be set aside, so that the property, without destroying any constituent part of it, may be brought into market and sold for what it is worth. We therefore set it aside, and leave both parties at liberty to apply to the special term to have their rights in the property correctly adjusted.

OFFUTT & CO. ET AL. vs. KING ET AL.**IN EQUITY.—No. 1035.**

- I. The creditors of a deceased person may come into a court of equity and ask to reach the property belonging to his estate and apply it to the satisfaction of their claims, without having previously established the amount of their debts by judgments at law. The administration of the assets of a deceased person is a well-established rule in equity jurisdiction.
- II. A deed of trust executed for the benefit of the grantor's wife and children, in consideration of love and affection, is not void on its face as to creditors by reason of a provision therein by which the grantor reserves to himself the right to sell and dispose of the trust-property as he shall deem most for the advantage of his said wife and children, and where the property, however varied, is to be in the name of the trustee for the benefit and use of the beneficiaries during such grantor's natural life, and at his death is to be equally divided among them.
- III. A voluntary conveyance is void as to existing creditors, but not as to subsequent creditors, unless there is intentional fraud contemplated by the grantor in the creation of future debts.
- IV. Where a person is indebted in a small amount and is doing a prosperous business and is not embarrassed in his circumstances, he may make a conveyance in favor of a wife and children, and it cannot be impeached for a want of consideration. Natural love and affection is a good and valid consideration in a deed from a parent to a child.
- V. A creditor may apply payments to any of the debts due him, in his discretion, where the debtor has failed to give any direction; and when he makes it, he cannot afterward change the application. Equity, however, will not permit an appropriation to be made by the creditors for the mere purpose of showing an apparent indebtedness at the date of a trust-deed, in order to raise a presumption that it was fraudulently executed by the debtor.
- VI. Where testimony has been taken upon a matter not in the pleadings, and where there is no stipulation in regard to such matter, no decree should be made, but the parties should be left to pursue other remedies.

STATEMENT OF THE CASE.

The original bill in this cause was filed by the creditors of Elijah Shelton, deceased, in 1855, praying that a certain deed

of trust executed by said Elijah Shelton, May 12, 1852, conveying the property therein described to William A. King, in trust for his wife and children, should be declared void upon the ground of fraud against creditors. Pending the proceedings, Thomas Knowles took possession of the property in dispute, at the instance of the creditors, receiving the rents and profits, to be held by him to abide the event of the suit. The case was referred to an auditor, who duly made his report, which was filed of record.

On the 25th day of May, 1870, the cause was heard in the equity court, before Justice Wylie, and the court declared the deed of trust void on its face as a matter of law on account of a power therein reserved by the grantor to direct the sale of the property therein mentioned, and the investment of the proceeds for the benefit of his wife and children. From this decision an appeal was taken to the court in general term.

The trusts declared in the trust-deed concerning the property are, in part, as follows:

“ In trust for the said Elizabeth Shelton, (the wife of the said Elijah Shelton,) Martha Ann Shelton, Mary Jane Johnson, James Henry Shelton, Mildred Shelton, Sarah Elizabeth Shelton, Utah Shelton, and Charles Edgar Shelton, children of the said Elijah Shelton as aforesaid, and their heirs and assigns forever, subject, nevertheless, to the powers of sale and the exercise of the same hereinafter contained, reserved, and authorized; and upon further trust that whenever the said Elijah Shelton shall or may deem it for the benefit and advantage of the said beneficiaries or any of them to have the said hereditaments and furniture or any of them or any part thereof sold, it shall and may be lawful to and for the said Elijah Shelton, of his own mere authority and without the consent or concurrence of his said wife and children, or of the said Wm. Albert King, his heirs and assigns, absolutely to sell and dispose of the same hereditaments and furniture hereby conveyed, every or any part thereof, either together or in parcels, and either at public sale or by private contract, and to any person or persons whomsoever, and at such price or prices, and either for cash or upon credit, as to him shall seem best and most for the advantage of his said wife and children; and upon all or any such sale or sales it

shall and may be lawful to and for the said W. Albert King, his heirs and assigns, and it is hereby expressly made his and their duty, upon the sole request and by the mere direction of the said Elijah Shelton, to be testified by some writing or deed under his hand and seal, and upon full payment of the purchase-money or purchase-moneys, to convey the said hereditaments and premises which shall or may be sold unto such person or persons as the said Elijah Shelton shall or may designate and declare to be or to have become the purchaser or purchasers thereof as aforesaid, his, her, or their heirs or assigns forever, freed and absolutely discharged of and from the limitation and trust hereinbefore contained and created to and in favor of the said (wife and children,) and as fully, freely, and absolutely discharged therefrom as if the same had never been created and limited and not inserted in these presents."

The other facts necessary to an understanding of the case are mentioned in the opinion of the court.

Jones & Ashford and *W. D. Cassin* for complainants.

B. H. Webb contra.

Mr. Justice MACARTHUR delivered the opinion of the court :

The complainants filed their bill on the 2d of September, 1854, against the administrator and heirs at law of Elijah Shelton, deceased, alleging that they were creditors of the said Shelton, that the personal estate was not sufficient to pay their debts, and they therefore ask that the real estate be sold, and their claims paid out of the proceeds. I state the scope of the bill in this general manner in the outset, in order to meet an objection taken to the jurisdiction of the court, which it will be proper to dispose of before considering the other questions involved.

The point was made in argument that the creditors of a deceased person could not come into a court of equity and ask for the administration of the assets belonging to his

estate until they had established the amount of their claim by a judgment at law. This principle is undoubtedly correct when applied to an ordinary creditor's bill, where the judgment-debtor is alive and can be made a party, and where he has concealed his property, or has equitable interest that cannot be reached at law. The object of such a bill is to discover his property and apply it to the satisfaction of an execution. In such case the remedy at law must be exhausted before you can pursue the remedy in a court of equity. This principle does not, however, apply here; for the administration of the assets of a deceased person is a well-established rule in equity. Mr. Story explains the doctrine fully, and traces the jurisdiction to the power and duty of the court to enforce the execution of trusts. It is held that the estate of a deceased person ought to be applied to the payment of his debts and legacies, and that the estate is subjected to this trust in the hands of any person who may be entitled to its possession, or who may have obtained it with notice of the trust. The jurisdiction is therefore properly cognizable in equity. 1 Story, Eq. P., secs. 530 to 547, and foot-notes. One of the members of the court intimated some difficulty on this point at the hearing, but he now concurs in the views expressed, making the opinions of the court unanimous in sustaining the jurisdiction.

This brings us to a consideration of the merits.

It appears that Elijah Shelton during his life-time owned the north $\frac{1}{2}$ and the south $\frac{1}{2}$ of lot 23, in Beatty and Hawkins's addition to Georgetown. He had his homestead on the south $\frac{1}{2}$, and resided there with his family. On the 12th day of May, 1872, he conveyed the said south $\frac{1}{2}$, together with all his household furniture, to the defendant King, upon certain trusts, for the benefit of his wife and children. The real consideration named in the deed was, natural love and affection. The bill alleges that at the time of executing this deed Shelton was indebted to the complainants, Offutt & Co., and that the deed was wholly voluntary, and was made for the purpose of putting the property out of the reach of said complainants, Offutt & Co., and of such other persons as he might thereafter become indebted to, and for these reasons, it is averred, the conveyance is null and void. The bill

further alleges that the grantor has made reservations in the conveyance which are inconsistent with any valid title in the trustee, and that it is therefore void on its face. We will consider this last point first.

The provisions in the deed of trust that are claimed to render it invalid are, that the grantor reserves to himself the absolute right to sell and dispose of the trust-property in any manner that shall seem to him most for the advantage of his wife and children, and that the trustee shall execute deeds to the purchaser and invest the purchase-moneys again, as he shall be directed by the said Shelton ; but the property, however varied, shall be in the name of the trustee, for the benefit and use of the beneficiaries during the natural life of the grantor, and at his death the trust-funds are to be equally divided among his said wife and children. The ground for asking that the conveyance be declared void is this power reserved by the grantor as to the sale and investment of the trust-estate. It is a sufficient answer to this objection that the trust pervades the entire deed and attaches to the property, however changed. We cannot see how this reservation can invalidate a deed of trust. A man may convey his property upon any trusts that are not prohibited by law ; and surely there is nothing unlawful in the mere fact that he retains a controlling voice in the variation of the trust-estate for the benefit of minor children. If he had provided that upon the children coming of age the property should revert, or if he had settled the estate in trust for the joint benefit of himself and family during his life, and directed it then to be divided equally among his heirs, no one, I think, would contend that these limitations would defeat the deed. We read in the books that a man may covenant to stand seized of his own property in trust for the benefit of others, thus making himself his own trustee ; and it is quite common in marriage-settlements for one of the parties to convey property in trust for the use of both, and in case of the death of the other party first, without issue, that the estate should revert to the grantor. It seems to us that a power to direct the variation of the property would not be so important a reservation as those just stated, especially when the property, into whatever form it might be converted, was to be subject to precisely

the same trusts as those in the original declaration. We cannot discover any legal turpitude on the face of the instrument, and must therefore hold that it created a valid trust, unless defeated by actual and intentional fraud.

This brings us to the statement in the bill that the deed of trust was executed with intent not only to defeat existing creditors, but also in contemplation of creating future debts. The statute of 13 Elizabeth, which is in force in this District, declares all conveyances void which are made with intent to defraud creditors, but by a proviso in the act itself it does not extend to *bona-fide* deeds made upon good consideration.

The decisions are very numerous which hold that mere voluntary conveyances are within the statute, and therefore void as to existing creditors, on the ground that a man must be just before he is generous, and the gift of his property to a stranger is held to be a fraud both upon the statute and the persons to whom he is indebted. A distinction is, however, made between existing and subsequent creditors; for as against the latter the conveyance is not void unless there is intentional fraud contemplated by the grantor in the creation of future debts. *Chapin vs. Pease*, 10 Conn., 69; *Gunn vs. Butler*, 18 Pick., 248; *Reed vs. Livingston*, 3 Johns. Ch. R., 481; 1 Am. Leading Cases, 52, 53; *Sexton vs. Wheaton*, 8 Wheaton, 229, 252.

Another well-recognized exception to the rule is that where a person is indebted in a small amount, and is doing a prosperous business, and is not embarrassed in his circumstances, he may make a voluntary conveyance in favor of a wife and children, and it cannot be impeached for want of consideration. This point has been expressly decided in the Supreme Court of the United States in the celebrated cases of *Sexton vs. Wheaton and Wife*, 8 Wheaton, 229–251, and *Hinde's Lessee vs. Longworth*, 11 Wheaton, 199. The first of these cases was brought by a subsequent creditor to have a conveyance declared void, and the other was brought by persons whose judgments were founded upon debts contracted prior to the alleged fraudulent conveyance, and the court, in view of the proofs, sustained the deeds in both cases, on the ground that natural love and affection is a good and valid consideration in a deed from a parent to a child.

To the same effect are *Salman vs. Bennett*, 1 Conn., 525, 558; *Verplank vs. Sterry*, 12 Johns., 536; 1 Story Eq. Pl., sec. 355, and foot-note.

So far, therefore, as we are concerned, the doctrine of our own Supreme Court, even if it were not sustained by decisions elsewhere, would be conclusive upon us. Indeed, we doubt if a case can be found in which a court of equity has held such a deed void, in favor of creditors, unless actual fraud is proven. Each individual case must depend on its own circumstances and the nature of the transaction.

In applying these principles to the case under consideration, it is quite clear that no fraudulent intent is proven as to those complainants who became subsequent creditors. The deed was recorded the day after its date, and no secret trusts are shown. The record constructively was an open and notorious notice to those who dealt with the grantor that they were not to trust him on the faith of that property, and more than a year elapsed before the first transaction with either of them, nor is there a particle of proof that Shelton contemplated dealing with them when he made the conveyance; and I think it may be almost inferred from the circumstances that they sought him rather than he them to make the purchases upon which their alleged indebtedness arose. The court are of opinion that, as the deed of trust was not directed against subsequent creditors, it cannot be avoided by them.

The remaining question is, whether the deed was void as to Offutt & Co., who were the only creditors of Shelton at the time of its execution. We have seen that blood and affection, by repeated decisions, is a good consideration within the terms of the statute; so that the question is reduced to a matter of actual intention, provided the grantor was in a condition to make the conveyance. A reference to the circumstances which surrounded the transaction is therefore necessary.

It appears both from the pleadings and evidence that Shelton opened an account with Offutt & Co., who were merchants in Georgetown in the year 1850, which continued until his death. They supplied him with goods, and the account which they file in the testimony shows that at the date of the deed of trust there was a balance due them of \$400. Shelton

died March 17, 1854, nearly two years after he executed the conveyance. The whole amount of the account is over \$7,000, covering a period of more than four years. Previous to the deed of trust he had paid from time to time various sums of money amounting in the aggregate to over \$4,000, and after that time up to his death, his payments amounted to \$3,078.35, leaving a balance still due of \$311. Shelton was a colored man and had been emancipated, and for one of his bumble condition appears to have had unusual business qualities, and one of the members of the firm swears that it was on this account alone they gave him credit. He was doing a prosperous business, his indebtedness was not considerable, and he was not embarrassed at the time. He had other property, but its value then does not appear; nor is the value of his stock in trade at that time shown by the testimony. It seems, however, that he continued to trade with Offutt & Co. as before, making his purchases and payments from time to time, and within three months had paid more than the balance due at the time he executed the deed, and at the time of his death his payments exceeded many fold such indebtedness.

We think these facts repel the presumption of fraud in the execution of the deed. If an inference is to be drawn from the nature of the deed that it was to delay creditors, certainly that inference is successfully resisted by the steady and constant payments he is admitted to have made. When it is alleged that a conveyance is made in derogation of the rights of a single creditor, surely the payment of more than enough to liquidate that debt should remove the injurious imputation and relieve the transaction from the unfavorable inference. And when we see a series of these mutual dealings continued after the record of the deed, it could certainly only be by an overstrained assumption that we could eliminate fraud out of circumstances that are so entirely consistent with fair and honest traffic.

But it is said on the other side that Offutt & Co. in their bill elect to apply the payments made subsequent to the execution of the deed of trust to the items of subsequent indebtedness. The right of the complainants to make the application here claimed cannot be conceded without qual-

ification. The principle that a creditor may apply payments in his discretion when the debtor fails to give any direction, is conceded, especially when there are different liabilities against the party making the payment, such as simple contract debts and specialties. The right of appropriation may be exercised by the creditor, unless the debtor points out the debt to which the application is to be made at the time he pays. But if the creditor makes the appropriation he cannot change it afterwards. Now, the payments made by Shelton from time to time were made to apply generally on the open account. This was such an appropriation as would not leave any particular item due, but only the balance after deducting the payments, and having exercised the right in this manner it can neither be recalled nor changed. The account-current introduced in evidence does not form separate debts, but the items are blended into an entity when the creditor or debtor applies a general payment. Besides, we think it would be inequitable to permit such an appropriation as is claimed now for the mere purpose of leaving an apparent indebtedness at the date of the deed of trust, in order to raise a presumption that a certain transaction of the debtor was fraudulent. It would be the act of the creditor really creating a case of fraud at his own option for the purpose of asking relief where no fraud existed; and it would effectuate an injustice to the motives and intentions of parties through the agency of a court of equity. We do not consider it our duty to encourage such labored management to raise a presumption of fraud. We are satisfied that the deed of trust is valid in law and fact.

There was a mass of testimony taken before the auditor, but in view of the conclusion we have announced respecting the validity of the trust-deed, it becomes irrelevant and presents no point the court ought to pass upon. It appears that Thomas Knowles, one of the firm of Offutt & Co., was appointed administrator of the personal estate belonging to the said Shelton, and soon after the commencement of this suit he went into possession of the premises embraced in the deed of trust. He claims he took such possession with the consent of King, the trustee, and of some or all of the heirs, and under an arrangement by which he was to collect the rent and prof-

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its of the premises until they should amount to enough to pay the indebtedness of the said Elijah Shelton, or until the court should decide upon the deed of trust. A great deal of testimony taken by the auditor was in regard to the rental value of this house and lot. As there is no relief asked in the bill and none in the answer in regard to this matter, and as there is neither cross-bill nor stipulation upon the subject, the court is of opinion that no decree can be made in reference thereto, but the parties may be left to such other remedies as they may be advised to pursue.

There is no doubt but the complainants are entitled to have the north half of the lot, which was not embraced in the deed of trust, sold for the payment of debts due from the deceased. The order appealed from must be reversed, and the cause remitted with directions to order the sale of the north half of the lot, and to apply the proceeds to the payment of debts that shall be found due from the estate of the said Elijah Shelton.

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WILLIAM BARNES vs. THE DISTRICT OF COLUMBIA.

AT LAW.—No. 9239.

- I. The act of Congress to provide a government for the District of Columbia confers such powers only as are granted in the statute creating that government, and such powers as are necessary to carry into practical effect those which are expressly granted.
- II. This act confers upon the government it creates no control over the avenues, streets, or alleys in the District; nor does it impose on it any duty to repair or keep them in order, and therefore an action for an injury caused by a defect in one of the streets will not lie against the District.
- III. The act creates the board of public works, and provides that they "shall have entire control of the streets, and shall make all regulations for keeping them in repair," and the members of the board are to be appointed and paid by the United States. It is, therefore, held that they act independently of the municipal government of the District, and that the District is not liable in an action at law for damage occasioned by the negligence or misconduct of the said board.
- IV. On February 5, 1867, Congress authorized the Baltimore and Potomac Railroad to construct a lateral branch of their road into the District of Columbia, and prescribed how the road might pass along the public streets and alleys to the point of terminus within the city of Washington, and in no way subjected the railroad corporation to the control or supervision of the municipal government of the said city, and it is, therefore, held that said corporation was exempted from all interference from such city government, and that it was erroneous to admit in evidence on the trial an ordinance of the common council in reference to the use of a street by said company.

STATEMENT OF THE CASE.

The plaintiff sues the District of Columbia for an injury alleged to have been received by him on K street, southeast, in the city of Washington. He claims that while traversing the street in question in the evening, after dark, he fell into an excavation and injured one of his legs. The excavation was made by the Baltimore and Potomac Railroad Company in constructing its track under the acts of Congress which authorized the company to construct a lateral branch into

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the District, and to use the streets of the city for that purpose. The court instructed the jury on the trial of the case that if the District had notice of the existence of the excavation, the action would lie against it for the injury. The case was tried March, 1873, and a verdict rendered in favor of the plaintiff for \$3,500. A motion for a new trial was overruled, and the case comes here on exceptions.

The first of these exceptions is to the admission of an ordinance of the late corporation of the city of Washington, together with a plat in regard to changing the grade on K street, and giving permission to the Baltimore and Potomac Railroad to construct their road thereon; and the other exception related to the liability of the District of Columbia when it was not invested with any care or control of the streets and avenues. The charge of the court was also excepted to, so far as relates to the liability of the District for the injury complained of.

R. K. Elliot for plaintiff.

I.

The ordinance of the late corporation of Washington, to which exception was taken by defendant, was properly read in evidence, and the accompanying plat, being a part thereof, was properly exhibited to the jury.

The ordinance was a valid, subsisting act, in full force and effect at the time of the occurrence of the accident to the plaintiff, and at the time of the trial at the circuit, and inasmuch as defendant is the legal successor of the corporation that passed the ordinance, it was bound by it, and bound to take notice thereof.

The act incorporating defendant continued the ordinance in force, and it was notice to defendant, its officers and agents, that the Baltimore and Potomac Railroad Company had been authorized to change the grade of a portion of K street, S. E. Dillon on Mun. Cor., §§ 288, 289, 290.

Defendant was, therefore, bound to take notice of the change of grade made in pursuance of that ordinance, and resulting in the excavation or pit-fall complained of; and in so far as the ordinance tended to prove by *what* authority

the change of grade was made, and the effect thereof upon the remainder of the street, it was of course competent evidence, but it did not tend to connect the defendant with the *construction* of the railroad, as that question was not in the case, but it merely tended to show the existence of an ordinance authorizing the change of grade, and hence the excavation, and as that ordinance, within the municipality, had the force of law, defendant was bound, at his peril, to notice it. *Ibid.*, § 245.

II.

The fact that the board of public works is appointed and paid by the United States, does not render its members officers of the United States, in respect to their municipal or local duties.

The majority of the principal officers of the government of the District of Columbia, the defendant here, are appointed and paid by the same authority.

It is not correct as a proposition of law, nor is it correct in point of fact, that "*all the functions of the board are derived from the United States.*" (See act of Congress cited above.)

The defendant, as a municipal or local government, can interfere with the streets of the city, and has interfered therewith. It has conferred on the board all the specific power and authority it possesses in relation thereto, by numerous acts of its legislative assembly, passed at divers times during its several sessions.

The 37th section of the act of Congress, creating defendant, does not constitute the board an independent body of public agents whose functions concern the State at large.

They are peculiarly local or municipal officers, whose duties concern the municipality alone. They have no fund, and have no power to raise a fund.

They have no subordinate officers, and no power to appoint them independent of the will of the defendant.

They can do nothing in respect to the streets, avenues, &c., without obtaining the sanction of defendant, and an appropriation of funds necessary for the performance of the work. They act under the direction of the defendant, make contracts binding upon it by its authority, but not otherwise; report to it, execute its laws, enforce its ordinances, expend

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its appropriations, use its officers, and direct and perform such work as may be imposed upon them by the defendant, in respect to the local or municipal affairs of the municipal government *as such*. They are, therefore, by adoption at least, the agents of or a branch of the government of the District of Columbia. Wherefore their acts of omission and commission, within the scope of their authority, become *ex necessitate* the acts of the defendant. *Bailey vs. The Mayor*, 3d Hill, 358, 531; S. C. 2d Denio, 450; Dillon on Municipal Corporations, § 32; Sherman & Redfield, §§ 155, '73; *Thayer vs. Boston*, 19 Pick., 511.

It is not contended that defendant could prohibit or control the excavation, but it could have warned the citizen of its existence, and it was bound so to do or cause the railroad company to do it.

The suit in this case should *not* have been brought against the board of public works, for if they are, in law, what the defendant contends they are, to wit, an independent body of public agents, they are not suable in a private action by a citizen for negligence in the performance of their duty—they are answerable only to the State.

The fact that the board of public works, as such, or as individuals, can sue, is no reason why the defendant here cannot be sued. Neither is it claimed that the defendant and the board are both liable to the plaintiff in this cause—the action is against the municipal corporation alone.

There was no error in the charge of the court to the prejudice of the defendant. The law as stated therein has been uniformly held by the courts in respect to the liability of municipal corporations for negligence, and does not require the citation of any authorities to sustain it, in addition to those to which reference has already been made.

William A. Cook and Enoch Totten for defendant:

The ordinance of the city of Washington was *irrelevant*.

It was not the act of the District of Columbia.

Received as evidence, allowed to be considered by the jury, *its effect was injurious to the defendant; could not be otherwise*. It tended, inevitably, to connect the District of Columbia

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with the construction of the Baltimore and Potomac Road; to create the impression that the District authorized and sanctioned it; and was, therefore, responsible for the evidence of the excavation and the injury received by the plaintiff. It placed the defendant in an unfair and incorrect attitude before the jury.

Evidence which does this is always improper. Its effect on a verdict must be unjust.

The District of Columbia, under the act of Congress creating the present government of the District, has no control over the avenues or streets of Washington. The "entire control," by the 37th section of the organic act, is conferred on the board of public works. 16 Stats. at Large, p. 426.

And this board is not only appointed and paid by the United States, but all its functions are derived from the United States.

Hence the District of Columbia, as a *municipality or territory*, cannot interfere with the streets. It is not charged with the control of them for repairs or otherwise. It cannot alter or modify the enumerated or specific functions of the board. How, then, can it be held responsible for defects in the streets and avenues?

It is true, it *may* make appropriations for the improvement or repair of the streets; but it is not *required* to do so.

Whether it will do so or not must depend exclusively on the judgment or discretion of its legislative assembly.

If it could be held responsible at all for injuries arising from defects in the streets, it could only be when it has given its sanction to improvements by making appropriations for them.

But no appropriations had been made for the improvement of K street east, at the time of the defendant's injury. No contract existed for its improvement with the District or the board of public works.

The cause of the injury was created entirely by the Baltimore and Potomac Railroad, acting under the exclusive authority of Congress.

The railroad was, therefore, the only proper defendant.

The District, while it had not authorized the excavation, *could not prohibit or control it.*

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The relation to the "cause of injury," which renders local governments ordinarily responsible, could not therefore exist on the part of the District. The local governments are held responsible on the ground of control over the localities of injuries, or over citizens creating them. The District had no such control over the railroad. It could issue no "permit"—it did not; it could establish no rule for the work of the road—it did not.

But if the railroad was not the only proper defendant, the suit should have been against the board of public works. *It*, and it *only*, possesses general statutory control over the streets.

And this court has decided that it is capable, as respects this very control, of suing and being sued.

It cannot be that both the District and the board can be liable to actions respecting the same matter or wrong.

The liability of the one excludes the other. *Board of Public Works vs. City of Washington et al.*, Shearman & Redfield on Negligence, Chap. VII.

The errors in the general charge are two. First, in holding the District of Columbia liable. This is done in different forms; among others, in saying that the District inherited, as respects the highways, the duties of the city of Washington; and second, in relation to implied notice, *i. e.*, that long-continued neglect on the part of the District would be notice.

This is too indefinite. And the evidence did not justify it.

Mr. Justice OLIN delivered the opinion of the court:

This case comes before us upon a bill of exceptions taken to the rulings of Chief-Justice Cartter, who presided at the trial.

The following are all the facts in the case appearing on the trial necessary to be recited to raise the question of law which I think decisive of the case.

It was made to appear that the Baltimore and Potomac Railroad Company had been incorporated by an act of the general assembly of Maryland, and that on the 5th of February, 1867, Congress authorized the extension, construction, and use of a lateral branch into and within the District of

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Columbia. This act, after prescribing the mode of acquiring the right of way over or through lands in the District, in section three, provides that whenever it becomes necessary for the railroad-track to pass any street or alley, the company shall make a convenient wagon-way, so as not to obstruct public travel, and providing, first, that said railroad shall enter the District at such place, and pass along such public streets and alleys to such point or terminus within said city, as shall be allowed by Congress upon presentation of map and survey of said road ; and further providing that the level of said road within the city shall conform to the present graduation of the streets, unless Congress shall authorize a different level.

Whatever powers or privileges were granted to this railroad company under this act were as wholly *independent* of the then municipal government of the city of Washington as though no such government existed. The same may be said of the acts of Congress of March 18, 1869, and of March 25, 1870. It will be seen in all of them that the powers and privileges granted by Congress to this railroad corporation were in no way subjected to the control or supervision of the municipal government of the city of Washington, and the power of Congress to exempt this railroad company from all interference with or control over it by the city government of Washington will scarcely be doubted,

On examination of the several acts of Congress in reference to this railroad company, I am at a loss to discover the necessity for or the propriety of the ordinance of the mayor, board of aldermen, and board of common council of the city of Washington of May 30, 1870, recited in the first bill of exceptions. They had nothing whatever to do in the matter. The same power that granted the privileges and rights to the railroad company created the board of aldermen, and it might have refused the one and destroyed the other at its sovereign will and pleasure.

To the introduction of this act of the corporation of Washington as evidence in the case, an objection was taken and the objection overruled. Upon any possible theory of this case, this evidence was, I think, inadmissible ; and as we can not know judicially what influence this testimony had in deter-

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mining the verdict of the jury, the verdict, for this cause alone, should be set aside.

But before the plaintiff in this case received the injury of which he complains, the old District government of Washington was abolished, together with all the offices created by it, or existing under it, and nothing was left of the old government save the ordinances passed by it, and those made subject to repeal by the incoming government. This was accomplished by the act of Congress of February 21, 1871, entitled "An act to provide a government for the District of Columbia."

By section first of that act it is provided "that all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body-corporate *for municipal purposes*, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all the powers of a *municipal* corporation not inconsistent with the Constitution and the laws of the United States *and the provisions of this act.*"

This last clause is worthy of observation.

I understand it to mean this: that Congress creates a municipal government for this District, with such powers, and such powers *only*, as are granted in the act creating that government. Municipal governments, like all other corporations, take such powers only as are expressly granted in the act creating them, or at most, such powers as are necessary to carry into practical effect the powers expressly granted.

The only remaining provision of the act of Congress creating a "government" for this District which it seems to me necessary to refer to, is contained in the 37th section.

The provisions of that section are as follows:

"SEC. 37. *And be it further enacted*, That there shall be in the District of Columbia a board of public works, to consist of the governor, who shall be president of the board; four persons to be *appointed by the President of the United States, by and with the advice and consent of the Senate*, one of whom shall be a civil engineer, and the others citizens and residents

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of the District, having the qualification of an elector therein; one of said board shall be a citizen and resident of Georgetown; and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, *unless sooner removed by the President of the United States.* The board of public works shall have *entire control of, and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city,* and all other works which may be intrusted to their charge by the legislative assembly," &c.

This is all of this section I deem it important to refer to. It will be seen, therefore, by the provisions of the three several acts of Congress in reference to the Baltimore and Potomac Railroad Company before referred to, that whatever rights, privileges, or immunities were conferred upon it, were wholly independent of the then existing municipal government of Washington.

This railroad company, in constructing its road, as by law it was authorized to do, opened a deep excavation for its track by the side of a traveled street, and so negligently omitted to put up barriers or safeguards, or lights, that a citizen in the exercise of ordinary care and prudence, as found by the jury, fell into this excavation made by the railroad company, and was seriously injured. He brings suit—not against the company, which was conceded by counsel on both sides of the case to be liable for the damage sustained if there was any liability in the case—but brings suit against the District government. Under the instruction of the presiding justice a verdict was rendered by the jury for the plaintiff.

The action, I think, cannot be maintained, because the organic law creating the existing government of this District confers on it no control over the avenues, streets, and alleys, in the District, nor imposes on it any duty to repair or keep them in order; and where no such power is given or duty imposed, it is the grossest of legal solecisms to affirm that an obligation can arise.

But it is argued that it is impossible to conceive of the existence of a municipal government that would not have power

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to open, improve, repair, and regulate the public streets and alleys within its corporate limits. All I have to say in reply is, if the thing really cannot be conceived of by a rational mind, it probably cannot be done; but I must add, that the act of Congress not only says that it can be done, but that it shall be done; and says so in language so plain that he who runs may read: "*The board of public works shall have entire control of the streets,*" &c.

After entire control of any subject or matter is given to one person or to a board, what kind of control can be implied, by way of reversion or remainder in the District, to some other person or body? What fraction of the whole control of a given subject is the entire control?

It is said that the board of public works is a constituent part of the District government as last organized; and, therefore, for any omission of duty by any constituent part of such government, whereby damage has been occasioned to third persons, an action may be maintained by such persons against the District government. This position, I think, is rather specious than sound.

It by no means follows that the municipal government of this District is liable in an action at law for damages occasioned by negligence or misconduct of an officer of this District in respect to the duties imposed upon them by law.

The marshal of this District, (who is no unimportant part of its government,) if he neglect to discharge his duty, to the injury of a third party, may be sued, and the damages sustained may be recovered off him; but whoever thought his negligence ever would be cause of action against this municipal government? The case put is no extreme one. The same may be averred of every officer of the District, from the judge on the bench to the constable or police officer. Statutes in *pari materia* are to be construed as one statute; it is therefore of no importance whatever that the board of public works was created by the same act of Congress which created the existing municipal government of the District.

It is argued, *thirdly*, that it would be a great *hardship* if a person injured as the plaintiff was could not maintain an action for the damage he received against the District of Columbia.

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I have before remarked that it was conceded on the argument that the primary liability in this case, if liability there was, was on the part of the Baltimore and Potomac Railroad Company, and this upon the principle, *sic utere tuo ut alienum non ledas*, so exercise your own rights as not to unnecessarily injure others. The plaintiff, then, having a clear right to maintain an action against the Baltimore and Potomac Railroad Company, it would seem to be no hardship that he was unable to maintain an action against some other person or corporation.

It sometimes happens, most frequently in actions of tort, that a person injured may have two remedies, or, more properly, a remedy against different persons, upon the principle of *respondeat superior*; but that principle has no application to the present case. The Baltimore and Potomac Railroad Company was not the servant or agent in any sense of the municipal government of this District; and I have before shown, I think, that the District had no authority or power conferred upon it over the streets of the city. Indeed, any interference with the streets, &c., on the part of the officers, servants, or agents of the District against the will or consent of the board of public works would be a trespass. The members of the board are appointed on the nomination of the President, confirmed by the Senate, paid by the United States; and being thus appointed, to them is committed the control and repair of the streets. It would be as much a trespass to interfere with their prescribed duties as with those of any other agents of the United States.

It was held by this court, after protracted argument, that the board of public works, created by the organic act establishing the existing municipal government of this District, was a *quasi corporation*, and as such might maintain a suit at law or in equity when the discharge of the duties imposed upon it was wrongfully interfered with. In that decision I concurred, and see no reason why we should reverse it. It would seem to follow, as a logical and legal sequence from that decision, that the board of public works would be liable to an action, if, by their neglect to perform a clear duty imposed by law, they occasioned special damage to some innocent person. I conclude, then, that if there was any

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remedy for the plaintiff beyond the liability of the railroad company, it was against the board of public works. But it is said that the board of public works have no fund out of which to satisfy any judgment which may be recovered against it. This, it seems to me, is no better reason than to say no man should be sued for an assault and battery who has no means to pay any judgment which may be recovered against him. The failure of a public officer to perform a duty imposed on him by law to the special injury of any person, is a good cause of action, but the damages awarded for such cause are to be paid out of the officer's private funds, and not out of any public funds under his control or elsewhere. This board was charged by law with the entire and exclusive control of the streets. If they neglected their duty and omitted to keep them in safe repair, *perhaps* they may be liable to suit; but upon this subject it is quite unnecessary, and therefore I express no opinion.

If the present action can be maintained, the tax-paying population of this District must pay the amount of the judgment. What offense, what neglect of duty have they been guilty of? A government is imposed upon them, in respect to which they have little or no voice at all, and in respect to the streets of the city absolutely none. But it is proposed to hold the tax-paying population of the District responsible for the negligence of this railroad corporation, created by Congress, or the negligence of the board of public works, created in the same way, and over neither of which the people of this District have any more control than the people of any neighboring State. I can readily perceive, upon grounds of public policy, that a municipality which elects or appoints its own agents, officers, or servants, may be held responsible for their misfeasance or malfeasance, and be made to sweat out by taxation all judgments recovered against such officers, servants, or agents for failing in any respect to perform their duty; but such a rule in this case would run the doctrine of imputed sin so far into the ground that I am unwilling to follow it. The President and Senate would be made responsible upon this rule.

I have not deemed it important to refer to adjudicated cases to sustain any principle I have announced. Those

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principles are so elementary in their character that the citation of cases might impair, but could not strengthen them. They will be found in Dillon on Municipal Corporations, a most able and instructive book, remarkable for its admirable arrangement and lucid examination of adjudicated cases, and in Shearman & Redfield on Negligence. No adjudicated case can be found, I think, where it has been held that a municipal corporation has been held responsible for the non-repair of streets, where the power to repair was not given, or the duty to repair imposed, or where the streets were in the charge of independent officers, over whom a municipal body has no control, either as respects their appointment or essential duties. Other considerations might be presented, but I do not deem it necessary to add more.

A new trial must be granted.

C. E. DODDRIDGE vs. M. C. GAINES.**AT LAW.—No. 5691.**

- I. A motion for a new trial on the ground that the court erred in its charge to the jury, where the rulings complained of were not excepted to before verdict, nor even after, will be overruled.
- II. The legal effect of an order that the motion for a new trial be heard at the general term in the first instance, is equivalent to a refusal of the presiding justice to entertain the motion upon his minutes of the trial; and the case can then only be heard at the general term upon a bill of exceptions to be settled by the justice.
- III. The motion may be made upon the minutes of the justice at the term at which the trial is had, and must be determined at the term in which it is made; otherwise, it will be regarded as denied or refused to be entertained.
- IV. If a motion for a new trial be made on the ground that the verdict is against evidence or the damages excessive, and it is denied by the justice presiding or he orders it to be heard at the general term in the first instance, if the moving party desires the merits of his motion to be reviewed by the court in general term, he must prepare a case to be settled as prescribed by the rules of the court.
- V. An order granting a new trial upon either of the grounds mentioned in section 8 of the act organizing this court is not appealable, but the denial of these motions involves the merits of the suits, and an appeal then lies to the general term.
- VI. The statute and rules in relation to what motions shall be heard at a special term and what shall be heard at a general term in the first instance, and also the distinction between enumerated and non-enumerated motions considered, and the proper construction of the provision of the statute, and the rules pronounced to be that no motion made to a court in special term can be heard at the general term, unless such motion involve the merits of the suit in which it is made

The case is sufficiently stated in the opinion of the court.

Moore, Hine, and Gray for the plaintiff.

Appleby & Edmonston for the defendant.

Mr. Justice OLIN delivered the opinion of the court:

This case involves a question of such frequent recurrence in this court, arising partly as to the true meaning and proper construction of the act of Congress establishing this court, and partly in connection with the rules of practice adopted by the court, that we have deemed it proper to reduce to writing what was in substance orally expressed as the opinion of the court upon the question before it, and to add some observations as to the rules of practice to be observed in similar cases.

It appears from the printed paper laid before us, which is certainly neither a case nor a bill of exceptions, that an action founded upon contract was brought by the plaintiff to recover the amount of \$50,000 for professional services as counselor or attorney at law. This paper says, "that on the trial of this cause the plaintiff introduced evidence conducing to prove that the defendant employed him as an attorney at law in the year 1858 to look into, examine, and give her a legal opinion in two certain suits, involving to the defendant a very large amount of property in the city of New Orleans; that for and in consideration of his said services," (that is, giving Mrs. Gaines a legal opinion in these two suits,) "defendant agreed to pay the plaintiff *a large or magnificent fee*, contingent upon the final success in said suit; that within one year or less he had performed all the professional labor which he was employed to perform; that within the year, and after the first employment of the plaintiff by defendant, the defendant fixed the amount of plaintiff's compensation herself at \$50,000, and promised to pay the plaintiff that sum at the final termination of the suits in the Supreme Court of the United States, provided that the defendant was successful;" and further, that the defendant was successful, and that the plaintiff was, for many years, a practicing lawyer, residing in West Virginia.

The paper further states, "that the defendant, to defeat the plaintiff's claim," introduced proof conducing to prove that she never employed the plaintiff as a lawyer; that she then had several eminent counsel, and had no need of the plaintiff's professional services; that she never promised to pay

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him for professional services; that she did promise to pay him two and one-half per cent. if he succeeded in negotiating a sale in New York of a certain interest in her property in litigation; that all the labor which the plaintiff performed was in reference to said negotiation, and not in relation to the suits in courts; that he failed in the negotiation, and that nothing was due to him on that account.

The paper further recited that the court charged the jury—

“That if they believed from the evidence that there was a contract between the plaintiff and the defendant, by which the defendant promised to pay to the plaintiff a stipulated fee, they would render a verdict for the plaintiff, according to the contract, unless they should further find that the contract was of such a nature that it could not be performed, on both sides, within one year from the time it was entered into; that, being a verbal contract, if not to be performed within one year, it was rendered void by the statute of frauds.”

One further instruction to the jury is recited in the paper, as follows: “That if they should find there was no stipulated fee fixed by contract, but should find that the plaintiff rendered services for the defendant at her request, they should find a verdict for the plaintiff for what his services were reasonably worth, unless they should also find that more than three years had elapsed from the time such services were rendered before the beginning of the plaintiff’s suit.” It is further stated “that the jury rendered a verdict for the defendant, and the plaintiff thereupon moved the court for a new trial upon the grounds filed, viz, 1st, that the court erred in its charge to the jury on the subject of the statute of frauds; 2d, that the court erred in its charge to the jury on the subject of the statute of limitations; 3d, that the verdict of the jury is contrary to the law as given by the court; 4th, the verdict of the jury is against or contrary to the evidence.”

Upon this motion being made, the Chief-justice made the following order: “Which motion for a new trial the Chief-justice holding the special term certified up to the court in general term, to be heard there in the first instance.”

This motion is overruled as to the first and second grounds mentioned as reasons for a new trial, because in reference to those two grounds it is not claimed or pretended that the rulings of the law made by the presiding justice were excepted to before verdict, or even afterward. It would be a novel ground for granting a new trial by an appellate court, that the rulings of the presiding justice were wrong in law, though expressly or tacitly assented to by both parties on the trial. The appellate court, in other words, is asked to grant a new trial upon exceptions taken to the ruling of the judge, when no exception was taken.

This would seem to dispose of the first two grounds of this motion for a new trial.

We will now consider the 3d and 4th grounds of the motion, and what is the proper practice to enable this appellate court to judge of the propriety of granting a new trial upon either of those grounds.

For this purpose, it will be necessary to recur to the act of Congress creating this court, and defining its powers, and, to some extent, regulating its practice.

The eighth section of the act, 12 U. S. Statutes at Large, 764, provides, "that if upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing, in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised; but such case or bill of exceptions need not be sealed or signed."

"The justice who tries the cause may in his discretion entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages, provided that such motion be made at the same term or circuit at which the trial was had. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner."

It is important that the provisions of this section be fully understood.

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I observe first, that this section speaks of a *case and a bill of exceptions*. It would scarcely seem necessary to explain to an attorney at law what is meant by a case or bill of exceptions, but at the hazard of wasting time I will state that a bill of exceptions, in practice, is a formal statement, in writing, of exceptions taken to the opinion or decision of a judge to a jury, *delivered during the trial of a cause*, or after the charge to the jury, and before the rendition of their verdict, setting forth the proceedings on the trial, the opinion or decision given, and the exception taken thereto. This bill of exceptions need not be signed or sealed by the judge, but is to be *settled* by the judge, that is, in some way certified to the appellate court that the bill of exceptions truly and correctly presents the question raised before him on the trial, and how decided. (See 3 Blackstone's Com., 372; 3 Stephens' Com., 615.) Whoever wishes to learn further as to the nature and mode of making a bill of exceptions, may consult Raymond on Bill of Exceptions, 33, 34; 2 Tidd's Practice, 862, 864; 2 Reeve's History of the English Law, 188.

The making of a *case* is provided for in this section, which, as near as I can define it, is "a statement in writing of the facts *proved on the trial of a cause*, drawn up and settled by the attorneys for the respective parties under the supervision of the judge, for the purpose of having certain points of law which arose at the trial, and which could not then be satisfactorily decided, determined upon full argument before the court in *banc*, (general term.) This is otherwise called a special case; and it is usual for the parties, where the law of the case is doubtful, to agree that the jury shall find a general verdict for the plaintiff, subject to the opinion of the court upon *such a case to be made*, instead of obtaining from the jury a special verdict. (See 3 Bl. Com., 378; 3 Stephens' Com., 621; Stephens' Pl., 92, 93; 1 Archbold's Prac., 216.)

The motion made for a new trial upon all the grounds mentioned in the paper before us, might, in the discretion of the justice presiding, be ordered to be heard in the first instance at the general term.

That order was made in this case, and the legal effect of

that order was simply a refusal of the justice to entertain the motion upon his own minutes of the trial.

What then? If a formal bill of exceptions be taken on the trial, and which was ground for a new trial, the party may thereupon appeal to this court in general term, and then have the ruling of the justice reviewed. If the exception be simply noted on the minutes of the justice, and he entertains the motion and denies it; or if he refuses to entertain the motion; or, as in this case, if he orders the motion to be heard at the general term in the first instance, the party then makes out his formal bill of exceptions, which is settled by the justice, and upon that brings the case to the court in general term.

If the motion for a new trial be made on the justice's minutes, upon either of the other two grounds mentioned in the statute: 1st. That the verdict is against the weight of evidence; or, 2d. That the damages given by the jury are excessive, and the justice entertains such motion and denies it; or, which is equivalent to a refusal to entertain it, orders the motion to be heard at the general term, in the first instance, then, if the moving party desires the merits of his motion to be reviewed by the court in general term, a case must be prepared, such as I have before described, containing the pleadings, and all the evidence given on the trial, or, at least, so much thereof as tends to prove or disprove the question in dispute, and sought to be reviewed, which case should always be settled as prescribed by the rules of court. In no other way can a motion for a new trial, for the two causes last mentioned, be intelligently reviewed by an appellate court. How can the latter court decide that a "verdict is against evidence;" or, "against the weight of evidence;" or, "contrary to evidence," except by having laid before it all the evidence given, tending to prove or disprove the issue submitted to the jury?

The same is true where the ground of the motion for a new trial is that the damages given by the jury are excessive.

This wise provision in the organic act, allowing a motion to be made at the same term at which the trial is had, for a new trial, on the ground that the justice erred in his rulings of law, no matter whether the rulings made and excepted to

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were at the time reduced to a formal bill of exceptions, or whether the rulings and exceptions were simply noted upon his minutes. In either case the justice may upon this motion reconsider his rulings of the law, and if he finds himself in error, may, and should, grant a new trial.

In respect to the two other grounds of motion, the pleadings being before him, and all the evidence given on the trial fresh in his recollection, the presiding justice is quite as well if not better qualified to judge of the propriety of granting a new trial than the appellate court can be, especially in reference to the two last grounds of motion mentioned in the act. He has the pleadings before him, listens to the testimony, sees the manner in which the witnesses testify, and knows how a question ingeniously put for the purpose of eliciting a favorable answer from a willing, anxious, and not over-scrupulous witness often decides the fate of a case before a jury. It is quite impossible for the appellate court to have laid before it what the justice presiding at the trial must necessarily know; unless the whole trial, by some mode yet undiscovered, could be, as it were, daguerreotyped and presented, in all its peculiar features, to the court in general term.

The law further provides that the motion for a new trial, upon the three grounds before mentioned, may be made upon the minutes of the justice, provided the motion be made at the term at which the trial is had. Such motion, if made, should be heard and determined at the term at which it is made, otherwise it should be regarded as denied or refused to be entertained, and, in either event, a case or bill of exceptions should be made, if it be desired to bring the matter for review before the court in general term.

If the presiding justice grant a new trial upon either of the grounds mentioned in section 8 of the organic act, such order would not be appealable to the court in general term, for the reason that the order granting a new trial does not involve the merits of the controversy. On the other hand, if the motion for a new trial be made to the justice presiding, upon his minutes, for either of the causes mentioned in section 8, and he refuses to entertain it, or entertains but denies it, an appeal may then be made to the general term in the mode I have pointed out. The denial of these motions,

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founded on the causes mentioned in section 8, involves the merits of the suit, for if the verdict of the jury be allowed to stand, judgment follows, as a matter of course, and ends the controversy.

This case seems to invite some further remark upon the peculiar provisions of the organic act, contained in section 5, providing for special terms of the court to be held by one of the justices at such time or times as the court in general term shall appoint. In pursuance of this power, the court has appointed the first Tuesday in each month, except August, for holding special terms. The section further provides that "non-enumerated motions, in all suits and proceedings at law and in equity, shall first be heard and determined at such special terms. Suits in equity, not triable by jury, shall also be heard and determined at such special terms. But the justice holding such special terms may, in his discretion, order any such *motion* or *suit* to be heard, in the first instance, at a general term." Two further provisions in the organic act ought to be considered in this connection, namely: The provision in the first section that "a special term may be held at the same time with a circuit court, and by the same justice;" and the provision, in the sixth section, "That such court in general term may also establish such other rules as it may deem necessary for regulation of the practice of the several courts organized by this act; and, from time to time, revise and alter such rules. It may also *determine, by rule, what motions shall be heard at a special term as enumerated motions, and what motions shall be heard at a general term in the first instance.*"

Under the power conferred, in the latter part of the sixth section, this court has determined, by its rules 100 and 101, what motions shall be heard, in the first instance, at a general term, and what shall be first heard at the special term.

The object sought to be attained by the provisions of the statute, and the adoption of rules 100 and 101, was to discriminate as to what motions should or might be heard at a general term, in the first instance, and what motions should be first heard and decided at a special term; the true meaning of the statute and the rule of court being that every motion not involving the merits of a suit or proceeding shall,

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in the first instance, be heard and decided at a special term, and that such motions are not appealable; nor can they be properly ordered to be heard at a general term, in the first instance. The only obscurity in the practice to be adopted, under the peculiar language of the organic act, arises out of the provisions contained in the 5th section, viz, taken in connection with the latter part of the 6th section: "Non-enumerated motions in all proceedings at law and in equity shall first be heard and determined at such special terms. But the justice, holding such special term, may, in his discretion, order any such motion or suit to be heard, in the first instance, at a general term."

This is all plain enough if we know what a *non-enumerated* motion is. For it would seem from this language that all non-enumerated motions in suits at law and in equity, whatever that designation may include, and all *suits* in equity, not triable by jury, may, in the discretion of the justice, be ordered to be heard at the general term. But the latter part of section 6 is strongly in conflict with such a construction of the provision in section 5, allowing the court to determine by rule what motions shall be heard at a special term as non-enumerated motions, and what motions shall be heard at a general term in the first instance.

I have looked with some care into works on the practice of courts of law to find the origin of the distinction between enumerated and non-enumerated motions, terms which are found in the organic act. The only light I have found on this subject comes from various works on the practice of the supreme court of the State of New York. It is generally reputed that Ex-Senator Harris, of that State, draughted the organic act establishing this court. He was for many years a lawyer of extensive practice in the State of New York, and for twelve or fourteen years a judge of its supreme court. By the rules of that court, early adopted, it was provided as follows: "Special motions are either enumerated or non-enumerated. Enumerated motions comprise, 1, motions in arrest of judgment, under which are considered motions for judgment *non obstante veredicto*; 2, motions arising on special verdict, bill of exceptions, case reserved at the trial, (including reports of referees,) subject to the opinion of the court, cases agreed on

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between the parties without trial, demurrer to evidence or pleadings, writ of error, or writ in the nature of writ of error, comprehending the writ of mandamus; 3, all motions to set aside a non-suit, verdict, inquisition, or report, otherwise than for irregularity exclusively. Non-enumerated motions include all other questions submitted to the court." *Graham's Practice*, 671. Here, so far as I have been able to ascertain, is the origin of the distinction in hand, and I allude to it now only because I think it gives some light as to the proper construction and meaning of the organic act.

It will be seen that what are designated as enumerated motions are motions involving the merits of the suit or proceedings, and very properly may be heard in the first instance in the general term. This, I think, is what the organic act designed to accomplish; and that all other motions possible to be made, but not involving the merits of the action, should be made and determined at special term.

If I have given the proper construction of the provisions of this law, no motion made to a court in special term can be heard at the general term unless such motion involve the merits of the proceeding or suit in which it is made.

Much has been said in this case in no way necessary to a proper disposition of the case; but it seemed to me to afford a convenient opportunity for the court to express its views, in writing, upon some questions of practice of frequent recurrence, which, if acquiesced in by the court, will be observed by the court and practiced by the bar.

MAX LUCHS vs. PARKERSON JONES.

AT LAW.—No. 8930.

- I. In case of the sale of real property under a deed of trust, the purchaser, as matter of law, becomes vested with the title, and if the person who executed the trust-deed remains in possession of the premises without any agreement to that effect, he becomes, by operation of the landlord and tenant act, tenant by sufferance to such purchaser, and, upon being notified to quit in thirty days, is liable to be turned out by proceedings under that statute.
- II. The judgment of the special term in cases of appeal from justices of the peace is final; and it has the same effect in cases arising under the landlord and tenant act as in other cases.

The case is stated in the opinion of the court.

Moore and Hine for plaintiff.

The plaintiff and appellant insist that the court below erred in deciding that there was no evidence conducing to show that the relation of landlord and tenant existed between appellant and appellee. It will be seen that in the deed of trust the appellee surrenders the possession of the property in dispute to the trustee, with a reservation to be re-invested with the possession upon the payment of the money due and other charges.

The appellant insists that the possession, as a matter of law, followed the legal title, which was vested in the trustee, and that, when the purchase was made by the appellant, the appellee became, by operation of law, his tenant, and was liable to be turned out by a writ of forcible detainer. (See Taylor's Landlord and Tenant, pages 38 and 39, sec. 64, and authorities cited, sec. 122, page 74.)

We insist that the judgment of the court below must be reversed.

Carrington & Carrington for defendant.

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Mr. Justice MACARTHUR delivered the opinion of the court:

This action was commenced before a justice of the peace of the District of Columbia under the statute "to regulate proceedings between landlord and tenant." Judgment was rendered in favor of the plaintiff for possession of the premises in dispute, and the defendant appealed to this court. On the trial in the special term, the judge presiding instructed the jury that "there was no evidence conducing to prove such tenancy as authorized this proceeding, and they must therefore find a verdict for defendant." A verdict was returned in accordance with this instruction, and an appeal was taken therefrom to the general term upon a bill of exceptions.

It also appears that the plaintiff read in evidence at the trial a deed of trust executed by the defendant, who was the owner of the premises in question, conveying them to Philip A. Darneille, trustee, and dated March 8, 1870. The deed recites that the defendant, Jones, had given his promissory note to George P. Needham for the sum of \$950, payable in twelve months, and to secure the payment of this note the said deed of trust was executed. It contains the usual power authorizing the trustee, upon default being made in the payment of the note, to sell the premises and convey them in fee-simple to the purchaser. Darneille was introduced by the plaintiff and swore that he was the trustee named in the deed, and that he sold the premises and conveyed them to the plaintiff, who was the purchaser. The plaintiff also proved that the defendant remained in possession without his consent, and that he had served him with a notice of thirty days to quit and surrender the premises. This is a substantial statement of the facts contained in the bill of exceptions upon which the court below directed a verdict for defendant. I was of opinion then that the relation of landlord and tenant between the parties could not be inferred from these circumstances so as to bring the cause within the statute upon which it was founded. A careful examination of the language used in the first section has satisfied me that in this respect my construction of the act was erroneous, and

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all the judges who heard the case here are of the same opinion.

That portion of the first section which is to be considered in disposing of this case, reads as follows:

“That a tenancy at will shall not arise or be created without an express contract or letting to that effect, and that all occupation, possession, or holding of any messuage or real estate without express contract or lease, or by such contract or lease the terms of which have expired, shall be deemed and held to be tenancies by sufferance; and all estates at will or sufferance may be determined by a notice in writing to quit, of thirty days, delivered to the tenant in hand or to some person of proper age upon the premises, or in the absence of such tenant or person, then such notice may be served by affixing the same to a conspicuous part of the premises where it may be conveniently read.”

It will be seen that tenancies of two kinds are here provided for, one being at will and the other by sufferance, and that both may be determined by a notice to quit in thirty days. It also appears that a tenancy at will cannot be created without an express contract, but that all occupation, possession, or holding of real estate without a contract, or by one the terms of which have expired, shall be deemed a tenancy by sufferance. The simple fact of possession where there is no contract is a sufficient circumstance to create such tenancy; and if a man, therefore, holds possession of premises belonging to another, and there is no agreement between them, the relation of landlord and tenant arises by mere operation of the statute.

At common law an estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterward without any title at all; as if a man takes a lease for a year, and after the year is expired continues to hold the premises without any fresh lease from the owner of the estate. 2 Blackstone, 150. It also occurs where the tenant willfully holds over after the determination of his term. But the act in force here relates to all occupation or possession whether with or without a previous contract, and declares in explicit terms that such possession is the ample requisite to constitute a tenancy by sufferance.

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I am aware that in several of the States it has been decided that in order to authorize the institution of summary proceedings to recover the possession of land, the relation of landlord and tenant must be shown to have existed between the parties by agreement. The statutes, however, under which these decisions have been made, differ from the one in force in this District. They do not undertake to create a new kind of tenancy, and a remedy to enforce it. They generally provide for cases of forcible and unlawful entries upon land, and for a wrongful holding over by a tenant after the expiration of the time for which the premises have been leased to him. The language used in the present act of Congress is more comprehensive, for it was evidently their design, in addition to these cases, to declare that where a person is in possession of land belonging to another without lease or agreement, he is to be deemed a tenant by sufferance, and that upon his being served with a notice of thirty days to quit, he is to be liable to the summary process furnished by the second section of the act. We hold, therefore, that these proceedings may be maintained in this District against a person in possession of real estate, although the conventional relation of landlord and tenant does not exist between the parties.

In the case at bar, it appears that the premises were owned by the defendant at the time he executed the deed of trust, and that upon the sale being made by the trustee the plaintiff became the purchaser. As a matter of law the legal title was vested by virtue of such purchase in the plaintiff, and the defendant remaining in possession of the premises without any agreement to that effect, became by operation of the statute tenant by sufferance, and upon being notified to quit in thirty days, was liable to be turned out by a proceeding of this kind.

The third section provides that if defendant upon the trial before the justice pleads title in himself, the suit is to be removed into this court. If the defendant's possession is without agreement, he is under no disability or estoppel from asserting title in himself, and if he pleads that fact, the cause is removed at once into an appropriate tribunal for the determination of such an issue. We can, therefore, see no incon-

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venience likely to arise from the construction we have placed upon the law.

Entertaining these views, we would be obliged to reverse the judgment if the case were properly before us. But we think the general term has no jurisdiction of the appeal. The twelfth section of the act organizing this court gives an appeal from judgments of justices of the peace, but expressly declares that such appeals shall be heard and decided at a special term. We have determined in several instances that the judgment of the special term in these appeal cases is final, and that we have no jurisdiction to review them here. We still think this is the obvious meaning of the statute. The right of appeal to this court in cases arising under the landlord and tenant act is given in the fourth section, but only in the same manner as appeals are taken in other cases. The judgment of the special term in this respect has, therefore, the same final effect as in other cases of appeal from justices of the peace, and it is equally clear that we can exercise no more jurisdiction in one case than in the other.

Although we are obliged to dismiss this appeal for the reasons stated, we have thought it a suitable opportunity to construe that portion of the law which was presented in the argument, as a judicial interpretation was of constant and almost daily importance.

Let the appeal be dismissed for want of jurisdiction.

**JOSIAH W. DEENER vs. WILSON E. BROWN AND
JEROME BROWNE, JR.**

AT LAW.—No. 9225.

W. made his bank-check for the accommodation of B., who transferred it to D. The latter did not present it for payment at the bank for upward of five months. For three or four months after the date of the check, B. was in solvent circumstances and the money could have been collected out of him, but subsequently he became insolvent, and so continued to the time of the trial. Immediately before the check was presented, W. directed the bank not to pay it: Held—

- I. That the drawer of a check appropriates the amount it calls for out of the deposit to his credit in the bank at the time of its date, and he has no right to withdraw it afterward.
- II. If the holder of a check delays in presenting it, and in the mean time the bank fail, the loss will be his and not that of the drawer.
- III. That the check was an accommodation-check loaned by W. to B., cannot exonerate him from liability, for he occupies the ground of the maker of commercial paper.

STATEMENT OF THE CASE.

Action on the following check:

“No. 40.] “WASHINGTON, D. C., *July 24, 1871.*
National Metropolitan Bank, pay to J. Browne, jr., or
bearer, one hundred dollars, (\$100.)

W. E. BROWN.”

[Revenue-stamp, 2 cents.]

(Indorsed :) “J. Browne, jr., J. W. Deener.”

On the — day of November, A. D. 1873, the above cause being called for trial, the same was submitted to the court to hear the evidence and determine the cause, whereupon the plaintiff proved the following facts:

1. The signature of Wilson E. Brown on said check to be the genuine signature of said defendant Wilson E. Brown. That said check was drawn in favor of Jerome Browne, jr.; that the signature on back of said check is the genuine

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signature of said defendant, Jerome Browne, jr.; and that said check was presented for payment at said National Metropolitan Bank on the 4th day of January, 1872, between the hours of 1 and 2 o'clock p. m., and during the business hours of said bank; and that payment thereof was refused by said bank. That said plaintiff received said check from said defendant Jerome Browne, jr., for valuable consideration, on the 26th day of July, 1871. And that said plaintiff presented said check at said bank for payment on the 4th day of January, 1872, and payment was refused by said bank. That said defendant Wilson E. Brown instructed said bank about the time said check was presented for payment not to pay said check. And that said defendant Wilson E. Brown had no funds in said bank with which to pay said check at the time it was presented for payment. That soon after said check was transferred to plaintiff he laid it away and forgot all about it, until, looking over his papers afterward, he accidentally found it, and immediately afterward presented it to said bank. That said National Metropolitan Bank at the date of said check was solvent, and continued to be solvent from the date of said check to the time of presentation of said check for payment, and continued solvent to date of trial of said cause, and was then solvent; and said plaintiff then offered and read in evidence said check. And that plaintiff was the present owner and holder. And then said plaintiff rested his case.

The defendant Wilson E. Brown, to maintain the issue on his part, offered and proved in evidence the following facts, subject to the exceptions hereinafter mentioned.

That said plaintiff presented said check for payment at said bank on the 4th day of January, 1872, and never before that time presented said check at said bank for payment.

That said check was an accommodation-check for ten days; that for three or four months from date of said check, said defendant Jerome Browne, jr., was solvent, and that the money could have been made out of him. And that in the month of November preceding the presentation of said check said defendant Jerome Browne, jr., was insolvent, and remained so up to the time of trial; that after the date of said check, and up to the date of November, said defendant

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Jerome Browne, jr., carried on business and paid many notes. And if said check had been presented at any time before said date it was presented it would have been paid, as it was for a small amount. And that the said Wilson E. Brown had been a good customer at the bank.

To the admissibility of each and every part of said evidence, at the time each and every part was offered, said plaintiff, by his counsel, objected. And yet the court overruled each and every objection, and admitted and heard each and every part of said evidence. And plaintiff, by his counsel, then and there excepted to each ruling. Whereupon said defendant Wilson E. Brown rested his case.

No evidence was offered on the part of said defendant Jerome Browne, jr.

Judgment was rendered by the court for defendant.

William J. Miller for plaintiff:

The plaintiff contends that the court erred in its findings, decision, and judgment upon the facts presented in this case, because, even admit for the sake of the argument (but which we do not admit) that the foregoing evidence on the part of the defense was admissible, yet there was no evidence to show that the defendant Wilson E. Brown (the drawer of the check) was injured by the non-presentation. On the contrary, it appears from the evidence that the National Metropolitan Bank, on which the check was drawn, was solvent at the date of the check, and from that time continued to be and was solvent at time of presentation of check for payment, and at time of the trial of the cause; and that the defendant Wilson E. Brown, drawer of the check, had no funds in the bank. Hence we claim that a valuable consideration having been given for the check, and Wilson E. Brown, drawer of said check, was not injured or damaged by the non-presentation of the check for payment before the 4th day of January, 1872, and as the bank was solvent on the day it was presented, and defendant Wilson E. Brown had no funds in said bank with which to pay said check, judgment should have been given for the plaintiff. In matter of Ephraim Brown, 2d Story, 502-511; *Conroy vs. Warren*,

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3 Johnson's Cases, 259; 4 Kent's Comm., 4th ed., p. 549, note*; *Little vs. Phoenix Bank*, 2 Hill, N. Y. R., 425; *Robinson vs. Hawkesford*, 9 Queen's Bench, 52; *Mullock vs. Radakisen*, 28 Eng. Law and Equity R., 94.

John E. Norris for defendant *W. E. Brown*:

There was no legal or sufficient demand of payment of the check, and no legal or sufficient notice, both of which are required. Laches on the part of the plaintiff takes away his right to relief. 1 Parsons on Notes and Bills, p. 355, and *Cruger vs. Armstrong, &c.*, 3 Johnson's Cases, 5, citing 2 Robinson, 173.

The plaintiff was bound to due diligence in presenting the check for payment. American Law Register, New Series, vol. ix, 320.

Checks drawn in the ordinary general form, not describing any particular fund, do not amount to an assignment of the funds of the drawer in the bank. Am. Law Reg., vol. vii, 376-7.

The same rules apply to checks as to notes and other negotiable paper and securities, that the holder must use diligence in collecting, especially if the condition of the parties has been changed so as to prevent the guarantor from re-imbursing himself. 1 Parsons on Bills and Notes, 355.

Mr. Justice WYLIE delivered the opinion of the court:

This is an action by the holder of a check against the drawer, Wilson E. Brown, and the indorser, Jerome Browne, jr., united as defendants, as permitted by our laws. The check is dated 24th July, 1871, is drawn for \$100, and payable to Jerome Browne or bearer. It was passed to the plaintiff in course of business, for value, and without notice that, as between the drawer and payee, it was for the accommodation of the latter. It was held by the plaintiff, without presentation at the bank, till the 4th of January, 1872—a period of five months and twenty days. It was then presented for payment, but the drawer had no funds in the bank to meet it, and payment was refused. The payee, Jerome Browne, makes

no defense ; but the drawer, Wilson E. Brown, claims that the check in question was drawn for accommodation of the payee, and that he was discharged from his original liability in consequence of the holder's delay in presenting the note for payment. At the trial in the circuit court the following evidence was offered by the defense, and allowed to go to the jury :

1. Evidence that the check was not presented for payment till the 4th of January, 1872.

2. That the check was an accommodation-check, loaned by the drawer to Jerome Browne, jr., for ten days.

3. Evidence that for three or four months after the date of the check Jerome Browne, jr., was in solvent circumstances, and that the money could have been collected from him ; but that subsequently to November, 1871, he was insolvent and continued so to the date of the trial.

To the admission of this evidence plaintiff objected, and excepted to the rulings of the court allowing it to be given to the jury.

No evidence was given or offered to show that the holder of the check was other than a bona-fide holder for value, and without notice of its accommodation character at the time it was assigned to him by Jerome Browne, jr. He must therefore be regarded as being the holder of a check purchased in the course of business, bona fide, for value, and without notice of any defense against it on the part of its drawer. Its accommodation character as between the drawer and the payee is, therefore, not an element belonging to the case which we are to consider. As against a holder of this character, the maker of accommodation-paper occupies no other ground than the maker of regular commercial paper.

The evidence admitted on this point, therefore, we think ought to have been excluded.

For the same reason we think the evidence tending to show that the indorser was solvent for four months after the date of the check, and after that up to the period when it was presented for payment, and even to the date of the trial, was of no consequence. The holder was not bound to know, nor was he informed, that the check was other than it appeared to be on its face ; and there he saw that Wilson E. Brown was the drawer of the check, and

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the principal in the transaction, and Jerome but an indorser and only contingently liable. Had he released the latter in express terms from all liability to him as such indorser, that would not have impaired his rights as against the drawer of the check.

But it is claimed for the defense that the plaintiff has lost his remedy in consequence of the long delay in presenting the check for payment.

There are three respects at least in which a check differs from a bill of exchange: first, it is always drawn upon a bank or banker, and is payable immediately on presentment, without the days of grace; second, it requires no acceptance apart from the act of payment; and third, it is always supposed to be drawn on a private deposit of funds, and amounts to an absolute appropriation of so much thereof to the holder of the check, to remain on deposit so appropriated until called for, and cannot be afterwards withdrawn. Ex parte Brown, 2; Story C. C. R., 511 to 518; 3 Kent's Com., 104, note; *Conroy vs. Warren*, 3 John's Cas., 259, &c.; Chitty on Bills, 583.

In *Hoyt vs. Seeley*, 18 Conn., 353, the holder of the check did not present it to the bank for payment for more than two years, but because the bank was all the time solvent, and the drawer of the check had sustained no loss in consequence of the delay, but had himself withdrawn the funds which otherwise would have been paid upon the check, it was held he was not exonerated from liability.

It is quite true that the rule requiring the prompt presentation of bills of exchange is also the rule as to the presentation of checks upon bankers. But it means no more than this: that if the holder of a check retains it in his possession beyond the time prescribed by the rule, he discharges the indorsers, if there be any, or takes upon himself the risk of the continued solvency of the bank. But the discharge of the indorsers is not a discharge of the drawer of a check, any more than the neglect of the holder of a promissory note to make demand of payment on the last day of grace, and give notice of non-payment to the indorsers in that case, would discharge the maker of the note from liability. He remains liable, although all the other parties may be discharged,

because his is the primary and absolute liability, while theirs is but contingent, conditional, and secondary. So when the rule of diligence requires a check, bill, or note to be presented within any certain prescribed period, it is with a view to the liability of the secondary parties alone.

But in addition to what has been said on these questions, the record shows us that the check in the present case was not made payable to the order of Jerome Browne, jr., but to him *or bearer*. It would have been quite as negotiable without the indorsement of Jerome Browne, jr., as with it. (See Chitty on Bills, 511.) And so the plaintiff seems to have regarded it; for after payment was refused, he took no pains to give notice thereof to the indorser. The holder was at liberty to treat the check as though it needed no indorsement, and contained none. The question is one, therefore, simply between drawer and bearer, and the rule in such case is thus stated by Kent: "As between the drawer of a check and the indorser, it ought to be presented for acceptance (payment!) with due diligence; but as between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appear that the drawer has failed, or the drawer has in some other manner sustained injury by the delay." 3 Com., 88.

But even if the accommodation character of the paper had been known to the plaintiff, we are not prepared to say that such a circumstance would have affected the result in this case.

In *Smith vs. Knox*, 3 Esp. R., 46, Lord Eldon said, "When a bill is given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action on that bill that the defendant accepted it for the accommodation of the drawer, and that that fact was known to the holder. In such case, if the holder gave a *bona-fide* consideration for it, he is entitled to recover the amount, though he had full knowledge of the transaction."

In Chitty on Bills, 305, it is said that the very object of an accommodation acceptance is to enable the party accommodated to obtain money or credit from a third person, and therefore the want of consideration furnishes no defense to one who

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has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer.

In the case under consideration, the drawer of the check had a deposit to his credit at the bank sufficient to pay the check at, and for some time subsequently to, its date. By the check he had appropriated its amount to this holder, and had no right to withdraw it afterward. The delay in presenting the check was at the risk of the holder. If the bank had failed the loss would have been his. But the money so set over was afterward withdrawn by the drawer of the check himself, and thus, after having taken the money, he is now attempting to throw the loss on the party whose money he unjustly appropriated.

Judgment reversed and new trial awarded.

**WILLIAM W. CORCORAN vs. THE CHESAPEAKE
AND OHIO CANAL COMPANY, AND HORATIO
ALLEN, J. B. H. SMITH, GEORGE S. BROWN,
ALLEN B. DAVIS, TRUSTEES.**

- I. The State of Maryland had obtained first liens upon the property and revenues of the Chesapeake and Ohio Canal Company. The legislature of the State afterward passed an act authorizing the company to borrow upon its bonds a sum not exceeding \$1,700,000, and the State waived her prior liens, so as to make said *bonds and the interest to accrue thereon* preferred liens on the net revenues of the company until the bonds and interest should be paid. The bonds were payable in 35 years, with interest at six per cent., payable on the first day of January and July in each year, and coupons were annexed in the usual form. On a bill filed by the bondholders to establish their lien on the revenues on an alleged default of payment, Held, that the State waived her liens only as to the principal of the bonds with simple interest, and that the interest on the coupons cannot be paid until after the liens of the State of Maryland are satisfied.
- II. A coupon payable on presentation and demand can bear interest only from the date of its maturity and after payment has been demanded and unjustly refused.
- III. The coupons being payable out of the net revenues, it is necessary in a suit to establish the lien of the bondholders, to allege and prove the existence of the fund, and a demand of payment is properly refused when there are no such revenues on hand.
- IV. A decision by the court of appeals of Maryland that the waiver of the State's lien is only in favor of the principal of the bonds and simple interest thereon, and does not extend to interest that may accrue on coupons attached to the bonds, although not matter of estoppel in this case, is nevertheless entitled to be received with very great respect.

STATEMENT OF THE CASE.

This bill was filed by the complainant in his own right, as well as in behalf of all holders of bonds issued by the defendant, "The Chesapeake and Ohio Canal Company," under and by virtue of an act of the general assembly of Maryland, passed on the 10th day of March, A. D. 1844. This act authorized the company to issue bonds to an amount not

exceeding \$1,700,000, payable in not less than thirty-five years, with interest semi-annually, the payment thereof to be secured by a preferred lien on the revenue and tolls that might accrue to said company from the entire and every part of the canal and its works between the termini at Georgetown and Cumberland. The bonds were accordingly issued, with coupons attached for the interest, and a deed of trust was executed and delivered, by way of mortgage, upon the revenue and tolls of the canal to secure, among other obligations, the payment of interest on said bonds semi-annually; and if the company should fail in its engagements, the grantees in such deed were authorized to enter, subject to certain conditions, and collect the tolls and revenues, and appropriate the same to the objects and intents of said instrument.

It is alleged in the bill that the company has failed, and refused to pay said coupons, and that a large amount is due thereon to the complainant. The prayer is for an account, and that the trustees be decreed to take possession of the tolls, revenues, and works, and apply the same according to the provisions of the mortgage.

The second section of the act authorizing the issue of these bonds contains a proviso in these words:

“And provided further, That the president and directors of said company shall, from time to time, and at all times hereafter, have the privilege and authority to use and apply such portion of said revenues and tolls as in their opinion may be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents and the current expenses of the said company.”

This proviso, it will be perceived, makes provision for the current expenses of the company, and makes the bonds preferred liens on the net revenue and tolls only.

The State of Maryland had loaned large sums to the company, to secure which she had obtained first mortgages or liens upon all its property and revenues, and in order to give currency to the bonds in question she waived her prior rights in their favor by the fourth section of the act, which is as follows:

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"SEC. 4. *And be it enacted*, That the rights and liens of this State upon the revenues of the Chesapeake and Ohio Canal Company shall be held and considered as waived, deferred, and postponed in favor of the bonds that may be issued under the foregoing sections, so as to make the said bonds and the interest to accrue thereon preferred and absolute liens on said revenues, according to the provisions of the second section of this act, until said bonds and interest shall be fully paid."

The pleadings were amended several times, until the only material question left for adjudication was, whether the coupons were entitled to bear interest from their maturity, which is to be paid out of the revenues of the company in preference to the claims of the State of Maryland. The other points drawn into argument not being passed upon by the court, we deem it unnecessary to mention them in this statement.

It is only necessary to add that the court of appeals of the State of Maryland has passed upon section fourth of the act under which these bonds were issued, in the case of *Virginia vs. The Chesapeake and Ohio Canal Company et al.*, 32 Md., 501, in which the complainant was a party defendant, and appeared and answered; and that court has decided the point now raised against him. It is contended that the construction thus given to a statute of a State by the highest judicial tribunal of such State is binding upon the courts of the United States.

J. M. Carlisle and *J. D. McPherson*, with whom was *J. B. Bryan*, of Richmond, for complainant, contended—

That the construction placed on section 4, chapter 281, Acts 1844, of Maryland Legislature, by the court of appeals of Maryland is in itself erroneous.

(a.) Because the right conferred by the chapter 281, Acts 1844, upon the Chesapeake and Ohio Canal Company, to issue bonds with interest, payable semi-annually, implied a right to issue coupon bonds. *Commissioners of Knox Co. vs. Aspinwall*, 21 Howard, 512; *Curtis vs. Butler Co.*, 24 Howard, 435; *Woods vs. Lawrence Co.*, 1 Black, 407; *Moran vs. Miami Co.*, 2 Black, 722.

(b.) Because in the construction of a statute what is clearly implied is as effectual as what is expressed. *Butz vs. City of Muscatine*, 8 Wallace, 591; *United States vs. Babbitt*, 1 Black, 61.

(c.) Because chapter 281, Acts 1844, Maryland, and the mortgage thereunder made to secure the preferred construction bonds, provided that the interest should be paid semi-annually on the first day of January and the first day of July in each year. Chapter 281, Acts 1844, § 2.—Mortgage, *passim*.

(d.) Because interest which, by agreement, was to be paid at certain specified times, as annually or semi-annually of every year before the principal is due, is chargeable with interest on each installment of interest. *American Leading Cases*; Hare and Wallace, vol. 1, p. 650, 5th ed.; 2 Parsons on Bills and Notes, 393; *Dunlop vs. Wiseman*, 2 Disney, (Ohio,) 398.

(e.) Because coupons bear interest when overdue and unpaid from the day they became payable, like any other commercial paper. *Aurora City vs. West*, 7 Wallace, 105.

(f.) Because arrears of interest relate to the original charge, and attach themselves to it as a mere incident, forming a part of the charge. (1870.) *Wertz's Appeal*, 65, p. 306. That even under the decision of the court of appeals of Maryland, in the suit of the *State of Virginia vs. The Chesapeake and Ohio Canal Company*, the refusal of the company to pay the face or principal of the coupons unless they are surrendered by the holders, is unwarranted, and amounts to a refusal to pay all.

(g.) Because the court of appeals of Maryland decided that, as to the company, the coupons bore interest from the day they were overdue and unpaid. *State of Virginia vs. The Chesapeake and Ohio Canal Company*, 32 Maryland Rep., 547, 548.

(h.) Because after the principal of a debt has been paid and received in full, no action can be maintained to recover any arrears of interest. *Southern Central Railroad Company vs. The Town of Moravia*, 61 Barb., 188, 189; *Fake vs. Eddy and Exor.*, 15 Wend., 80.

Bernard Carter and *John P. Poe*, of Baltimore, for the canal company :

If complainant is to be regarded as still at liberty to litigate, this question, this court will follow and adopt the conclusion of the court of appeals of Maryland.

(a.) Because those conclusions are, in themselves, correct. 26 Md., 290; 1 Hilliard on Mort., 86; 3 Parsons on Con., 635; 38 Missouri, 461; 13 Michigan, 303; 2 Cush., 92; 17 Mass., 417; 1 John's Ch., 13; 6 John's Ch., 313; 7 Greenl., 48; 25 Iowa, 319; 24 Md., 82; 5 Paige, 102; 23 Pick., 167; 1 Am. L. Cases, 534.

(b.) Because, even although were the question *res nora*, this court might doubt the correctness of the decision of the court of appeals, yet that decision being an interpretation by the highest court in Maryland, of a Maryland contract authorized by a Maryland statute, should be respected and enforced by all other courts where the same question is presented. The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.

Mr. Justice WYLIE delivered the opinion of the court :

The bill in this cause was filed by Mr. Corcoran in his own right, and in behalf also of all other holders of bonds such as are hereinafter described, who might desire to become parties to the suit and contribute to the expenses thereof. Subsequently Mr. Stewart was admitted to become one of the complainants. None of the other bondholders have availed themselves of the privilege.

After the suit was brought, the bill was amended more than once, and several stipulations were entered into between the counsel of the respective parties, in consequence of which the issues, originally involved in the controversy, have been reduced to one only, and that one is this: whether the holders of the preferred bonds of the Chesapeake and Ohio Canal Company, and of the overdue coupons annexed to said bonds, are entitled to interest upon those coupons from the dates

when they severally became due, payable out of the net revenues of the company, which were pledged for the redemption of said coupons, in the first instance, and for payment of the bonds themselves when they shall ultimately fall due.

In *Gelpecke vs. Dubuque*, 1 Wall., 206, and *Aurora City vs. West*, 7 Wall., 105, it was decided by the Supreme Court of the United States that, on general principles, coupons "*should draw interest after payment of the principal is unjustly neglected or refused.*" Those were actions at law, and in both cases payment of the coupons had been demanded at maturity, and refused. Had the complainants in this suit brought actions at law against the Chesapeake and Ohio Canal Company upon their coupons, and proved presentation thereof at maturity, and failure of the company to pay, it is clear they would have been entitled to a judgment, as well for the interest from date of the demand in each instance, as for the principal.

But it has so happened that all the property of the company is so heavily incumbered with mortgages or deeds of trust to secure the State of Maryland for money advanced for the construction of the canal, that a judgment at law would be fruitless, whether it were for a large or a small amount. And so these complainants have not chosen to resort to that form of remedy, but instead have resorted to equity to enforce their claim under the specific security which was given by the company for the payment of their bonds and interest. Now, it is very obvious that the extent of the relief to which they are entitled in this suit must be measured by the extent and character of their security. If they hold a security commensurate with their whole claim—bonds, coupons, and interest upon coupons—they may confidently expect a decree in their favor as extensive as their claim; but, on the other hand, if the security under which they ask relief be only partial, or restricted and limited, then must the decree, to be passed, afford them but partial or restricted and limited relief.

The charter of this company was granted in the first instance by the State of Maryland, then by the State of Virginia, to the extent of her territory made use of by the company, and again by the United States, so far as the District of Columbia was concerned. The State of Maryland, how-

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ever, being most deeply interested in the work, became its most liberal patron, subscribing for a majority of the stock, and making large loans to the company. On the 10th of March, 1845, these loans exceeded \$5,000,000, and were secured by mortgage upon all the property and revenues of the company. The work, however, was not yet completed to Cumberland, and it was estimated that \$1,700,000 would be required for that purpose. The legislature on that date passed an act by which the State consented to waive the priority of its own liens in favor of an issue of bonds to be made by the company to the amount of \$1,700,000, payable within thirty-five years, with interest at the rate of six per cent. per annum, payable semi-annually. Subject to the mortgage or deed of trust to secure these bonds, with their interest, the State was still to hold its mortgage upon the property and revenues of the company, as before. These bonds and interest were to be secured exclusively upon the accruing net revenues of the canal, and not upon any of its property or franchises. In ascertaining the net revenues, there were to be deducted, first, any sums which might be required to keep the work in repair and pay the salaries and wages of its officers and agents; second, the sum of \$5,000 a year to be applied to the payment of a debt due the creditors of old Potomac Company; and, third, the sum of \$25,000 a year to create a sinking fund for the ultimate redemption of the bonds themselves at their maturity. After these objects were provided for out of the revenues, the balance, if any existed, was to be applied to payment of the semi-annual interest upon the bonds, as it should fall due. In 1849 the company commenced to issue its bonds under and in pursuance of this law, with coupons attached, having executed a deed of trust upon its net revenues for their security. Both the bonds and their coupons refer to the act under which they were issued; the former in these words: "And by the terms of the said act, which has been duly accepted by the stockholders of said company, it is provided and declared that the bonds that may be issued by the said company under the said act to an amount not exceeding, in the aggregate, one million seven hundred thousand dollars, without any preference or priority over each other on account of date,

shall be preferred liens on the revenues of said company, according to the provisions of said act, until the said bonds and the interest thereon shall be fully paid." And on the margin of the coupon are the words: "Preferred lien on the revenues of the company." The body of the coupon refers to both the bond to which it is annexed by number, and to the act of the legislature under which it was issued by date and chapter.

It is under this legislation, and this security alone, that complainants have instituted the present suit, and ask for relief. Their claim is against the net revenues from the canal. But what is to be the result if there be no such revenues? The bill must fail for want of a subject as to which the court could pass a decree. Complainants must themselves not only allege in their bill, but prove, the existence of the revenues, else they can get no relief here. There can be no lien if there be no subject of lien. If the revenue comes into the treasury of the company the bondholders may claim its appropriation to the payment of their coupons. If the revenue fail, the coupons must wait. If it fail without fault of the company, (as the fact must be taken to be for the purposes of this case,) the company is under no obligation to pay, and there is no right on the part of the bondholders to ask for payment. A demand for payment when there are no revenues on hand to meet it, is premature, and properly refused. The coupon, by the very terms of the security given, is payable out of the revenues. If you seek your remedy against the fund, you have no right to claim relief unless the fund has existence. A refusal to pay in that case is not "*unjust*," but is consistent with the very terms of the contract.

In *Aurora City vs. West*, the court say "that interest on a debt is due from the time that payment is *unjustly* refused." Interest, therefore, is not to be allowed where the payment was *justly* refused. In the present case, the record shows that the company has always been ready and willing to pay the coupons when presented, provided there was "net revenue" in their treasury, applicable to that purpose.

There is another aspect of this question which we deem worthy of attention. The bond on its face contains the fol-

lowing provision as to payment of interest: "With interest thereon payable semi-annually on the first day of January and July in each year in the city of Baltimore, *on the presentation and delivery of the half-yearly coupons, hereunto annexed.*"

Now it is neither alleged in the bill, nor has it been shown by proof in the cause, that any coupon sued upon in this case has ever been refused payment when presented for that purpose by the complainants or either of them. On the contrary it is proved, as well as conceded by stipulation of counsel, that the company has offered to pay these coupons, as well as all others, to the extent of the fund applicable by law, and contract to that purpose, but that complainants have refused to accept such payment and surrender their coupons, unless on payment also of interest from the date when the several coupons fell due, notwithstanding the fact that no demand of payment at those times, or afterward, had been made.

Were this even an action at law, instead of the suit in equity which it is, to enforce a specific lien, that fact would be fatal to the claim for interest; for by the express terms of the contract the interest upon the bond was to be payable only "on the presentation and delivery of the half-yearly coupons" to the company in the city of Baltimore.

Under the decisions in *Gelpecke vs. Dubuque* and *Aurora City vs. West*, coupons bear interest only after payment of the principal has been unjustly neglected or refused. A coupon payable on presentation and demand can bear interest only from the date of its maturity and after payment has been demanded and unjustly refused. That principle of law is too clear to need either argument or authority in its support; and we cannot well understand how these complainants could expect to recover interest in this case without having either averred in their bill or proved by evidence that demand of payment had been made when or after they were payable. It is quite comprehensible why the demand of payment was not made in fact. Complainants knew that payment of their coupons could be obtained, if ever, only from the net revenues of the company, and that it was useless to make a demand of payment except when such rev-

venues existed; and they were aware, also, that to the extent of those revenues they were from time to time receiving payments. The idea of claiming interest upon the coupons sprung up only after the great majority of the coupons had been long overdue, and after the revenues had greatly increased, and probably in consequence of a misunderstanding of the decisions made in the cases referred to.

So far as the present suit is concerned, however, the demand of payment, had it been punctually made on each day when a coupon fell due, would have made no difference as to its result. For the purposes of this case, the coupons were payable only when there was "net revenue" in the company's treasury to meet them; and there is no evidence to show that any one of these coupons has ever been refused payment when that was the case. It is true the company has refused to pay some of these coupons when its revenues were in a condition to pay them; but only because the complainants themselves declined to accept the principal unless the interest were paid along with the principal.

Another question arises out of the consent of the State of Maryland that her earlier liens might be postponed to this one, to the extent, however, only of *the principal and interest* of the bonds. Her claims are very large, and if ever paid, it must be in a very remote future. In strictness, she has agreed to be postponed only for the principal and interest upon the preferred bonds, not for interest upon interest. And in her situation, we are inclined to the opinion she has a right to insist upon the very letter of the contract. It was so decided by the court of appeals of that State, in the case of *The Commonwealth of Virginia vs. The State of Maryland, the Chesapeake and Ohio Canal Company, and William W. Corcoran and others, trustees*. In that case Mr. Corcoran was sued, in his capacity as trustee, and although his answer made no reference to this fiduciary character, but, on the contrary, set up that he was the holder of a large amount of the preferred bonds of the company in his own right, and denied that the complainant was entitled to the relief sought, yet as he neither filed a cross-bill in the cause, nor made any claim as such bondholder beyond resistance to the preference of payment claimed by the State of Virginia, we think the

decision in that case would not warrant us in pronouncing it to be an absolute estoppel to the claim set up by him in this. Nevertheless, it is a decision made by a high and learned judicial tribunal, and entitled to be received by us with great respect.

These views, we think, dispose of the subject of controversy in the present cause upon the merits; and we deem it unnecessary to advert to any of the numerous points presented by the briefs of counsel relating to parties, and other questions of minor and incidental consequence.

The decree of the court below was as favorable to the complainants as they have any right to claim. It dismissed their bill, but without prejudice to their right to sue at law for the recovery of the interest in dispute; and further ordered that if the complainants should surrender any of said coupons on receiving payment of the same without interest, such surrender should not of itself be deemed an abandonment of their said right, if any such right existed.

Mr. Justice HUMPHREYS delivered the following dissenting opinion :

It has become so well established that the coupons attached to bonds of the character of those in this case bear interest if not paid at maturity, that it is not necessary to refer to authorities. But for the purpose of strength, reference is made to *Aurora vs. West*, 7 Wall., and *Virginia vs. Chesapeake and Ohio Canal Company*, 32 Maryland. Interest upon interest, as it is termed, is not favored by the law, and hence the doctrine pronounced by a learned chancellor in 1 John. Ch. R. The very nature of the transaction, and the use of the instruments, the bond and the coupon, by the parties, make it interest-bearing. It is not interest upon interest in the obnoxious sense, but the coupon at maturity starts on a career of its own, the law annexing to it the office and quality of an interest-bearing instrument, and a security covering the main body covers also the appendage, which has now become inseparable by reason of the default of the borrower. The language of the act of Maryland is, "so as to make the said bonds, and the interest to accrue thereon, preferred and

absolute liens on said revenues." The language used in all the sections is the same as to the appropriation of the revenues of the company, to make the bonds, and "the interest to accrue thereon," preferred liens. Is the interest on the coupons, interest to accrue growing out of the bonds? The decisions say that the coupons bear interest after maturity and if interest accrue by law on the coupons on failure to pay at maturity, it is because it is interest to accrue in consequence of the bonds being issued and the coupons not paid at maturity, and there would be no interest on the coupons except such as was to accrue on the bonds as a legal consequence of the failure to take up and retire the coupons.

The bonds issued under the act provide that they shall be preferred liens on the revenues of the company until the said bonds and the interest to accrue thereon shall be fully paid. The learned court of appeals of Maryland announced as clearly settled that the coupons bear interest after maturity till paid. But will it escape the conclusion, that it must be "interest to accrue" on the bonds when that is the only interest contracted to be paid, and if this interest does not accrue upon the bonds, then there is no foundation for it. It appears to me that the distinction taken on behalf of the State of Maryland, between the coupon and the interest thereon, is at war with the repeated adjudications of the Supreme Court of the United States. It is admitted that the interest is due because the coupon is unpaid, and that it grows out of the coupon, and that the coupon is covered by the lien; but it is insisted that the company must pay this interest on the coupons after satisfying the State of Maryland.

However, it may be said that the coupons were not presented at the place where they were payable, or that there is no allegation that they were so presented. According to well-established rules of law, the maker of the note must show that he had funds at the place of payment, or that the paper was payable nowhere else, before he can be exonerated from interest, or he must show a tender. And it is admitted in the answer that the company suspended payment for many years for want of funds, and if resumption was had it was their duty to notify the fact. If the maker deposits

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funds at the place of payment to meet the demand, then he is exempted from interest, otherwise he must hunt up the holder to tender if interest is to be avoided. It is insisted upon in the answer and in argument, that the complainants are precluded by the case of *Virginia vs. The Canal Company* in the courts of Maryland from this suit, the matters and things here involved having been there adjudicated, and the parties there being parties here. Exhibit No. 3 is admitted as evidence of the record, stating the points and objects of the bill in the case above referred to. The record in that case discloses that in December, 1867, a bill was filed in the circuit court of Baltimore County, Maryland, by the *Commonwealth of Virginia vs. The State of Maryland, the Chesapeake and Ohio Canal Company, and W. W. Corcoran, George W. Riggs, Horatio Allen, J. B. N. Smith, and J. Philip Roman, trustees, and some others*. The bill was filed to compel the canal company to apply its revenues, "first, to the payment of \$200,000 repair-bonds issued by the company to repair the canal below dam No. 6, which bonds were guaranteed by the State of Virginia; second, to the payment of certain certificates of the company to the amount of \$140,000, issued in lieu of coupons to Edson, Withers & Co., who, by arrangement with the company, had taken up said coupons, said certificates being now held by the company; third, to the payment of certain coupons on certain preferred bonds issued under the Maryland act of 1845, guaranteed by the State of Virginia, and secured by the deed of trust to W. W. Corcoran and others of June 8, 1848, with interest on the overdue coupons." From this record it appears that Corcoran, one of the present complainants, was before the court as a trustee and not as a party in individual interest, and the only matter or thing as regards the preferred bonds that was involved in the case was "certain preferred bonds," which we learn from the decree amounted to \$300,000, guaranteed by the State of Virginia. Corcoran appeared, but only as trustee. It appears to have been a suit of *State vs. State*, in substance, though the form was *State vs. a company for navigating objects*, in which another State had an interest, and especially provided by law to consent to be made a party.

If the learned court of appeals of Maryland decided a question involving the right of these complainants when they were not before the court, all the rules of law abhor the idea that they are concluded. Could Corcoran have taken an appeal in his capacity of individual holder of bonds or coupons from the decision in the case unless he had gone in under the decree? The record discloses the case to have been a suit by Virginia, setting up priority over all creditors for the amount of the repair-bonds and some preferred bonds which she had guaranteed. Corcoran was made a party because he was trustee, in his representative capacity as trustee, to whom the mortgage had been made in trust, and his answer was resisting any decree giving to Virginia a priority over the creditors holding preferred bonds. The court did determine in that case that the claim of the State of Virginia to interest on the coupons could not be allowed. But the decree directed the payment to the State of the principal and the coupons which had been paid by her to the amount of \$200,000; then that the \$300,000 that had been guaranteed by the State should share *pari passu* with those held and unpaid by other parties. There was no calling in of all the creditors. These complainants had not been made parties. There was no obligation on the part of the trustee to make himself a party individually.

The third point stated in the bill was to determine the payment of the coupons, the bonds on which they were based being preferred bonds guaranteed by the State of Virginia. The question of interest upon the coupons was decided, but the decision can only bind the parties properly before the court. The case is an authority to be cited as persuasive of what the law is on the point involved, but not conclusive upon these complainants. There is no part of the decree which provides for any holders of bonds or coupons other than Virginia's guaranteed bonds, \$200,000 repair, and \$300,000 preferred, and \$5,000 per year to the holders of bonds issued by the Potomac Company to come in and have their claims adjusted.

In fact, the whole record discloses a case got before the court for the purpose of eliciting an expression of opinion upon a general question, but which decree can in no just relation be held as *res adjudicata*, except as to Virginia.

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The bill in the case before us does not seek to disturb the decree of the Maryland courts; that stands untouched, for Virginia's guaranteed bond and coupon holders have been paid off, except interest on the coupons under that decree.

The present complainants sue for themselves as creditors, and seek the enforcement of a lien they assert to exist on funds wholly independent of the funds in the courts of Maryland.

Under the Maryland decree, the complainants could bring an original bill even in the courts of that State, and they would not be bound by the former decree.

The courts of that State would not apply the *res adjudicata*, but of course they could apply the rule of *stare decisis*. But the court of appeals would be at liberty to overrule its former decision as not being law; but if *res adjudicata*, it could not do so on an original bill, and if these complainants, or either of them, could bring and maintain an original bill in Maryland, then the case is not *res adjudicata*. And if a suit could be maintained in the courts of Maryland on an original bill, then it follows that suit may be maintained in this court.

It is nowhere pretended that Stewart was a party in any capacity to the Maryland suit.

See the case of *Good vs. Blewit*, 16 Vesey, in which Lord Eldon gave as full and satisfactory an expose of the rules determining the rights of creditors in choosing their forms of proceeding as any case to be met with.

Where a creditor's bill is filed on behalf of complainant and all other creditors who may choose to come in, then any creditor seeking to avail himself of the decree must himself make a party. Where one creditor files a bill on his own behalf, no other creditor is prevented from his own suit, unless he was directly made a party, and where a bill is filed by one creditor on his own and the behalf of all other creditors, no creditor who is not made a party directly, by proper process, is bound to go into that case. If he seeks the benefit of the decree he must make himself a party in the usual form. But if he does not seek the benefit of the decree, he need not come in. And if he further does not seek by his own bill to disturb the former decree, by interfering with the fund already

disposed of, he is not precluded from his own suit. We have before said that the bill before us does not seek to disturb the funds in the courts of Maryland, and the parties are free to ask the courts of Maryland, or of any other jurisdiction, to apply a rule of law although different to the one applied in the former case. We are all agreed that the State of Maryland has been made a party if necessary to be made so. A State that enters into the ordinary business transactions, mingling with individuals, puts herself on a level and must share the fate of suitors. *United States Bank vs. Planters' Bank*, 9 Wheaton.

It is insisted on part of respondent that the decision of the court of appeals of Maryland being the construction of a statute of a State by its highest court, is binding upon all other courts. This proposition as a general one is true, unless the question passed upon by the State court comes within the well-recognized exceptions to the rule. The act of a State legislature which impairs the obligation of contracts is no law at all (though sustained by the decision of the highest judicial tribunal of the State) outside the territorial limits of the State, nor upon the courts of the United States sitting within the State.

The repeated decisions of the courts of the country that the coupons bear interest after maturity, if unpaid, could be based upon no other ground than that the sequence was a part of the contract. If a part of the contract it is binding upon the parties, and to impair it by attempting to postpone a lien which covered all, where there was no express stipulation limiting the lien, is, as far as I can see, impairing the obligation of the contract.

But we are not without adjudicated cases upon these questions. *Swift vs. Tyson*, 16 Peters; *Williamson vs. Berry*, 8 Howard; *Jefferson Bank vs. Skelly*, 1 Black.

The conclusion to which my mind has come—attempting to be guided by authority—is, that, on all the points made, the complainants are entitled to a decree, as far as the powers of this court may reach, to subject the revenues and tolls of the company, deducting the amounts as expressly provided, to the satisfaction of coupons and interest thereon.

It is probable that, under the pleadings as now presented,

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nothing further could be decreed than an account as to the amount due, and the capacity of the tolls and revenues of the company, over and beyond the expenses provided for by the act and the mortgage, and leave the parties to amend the pleadings, and to make proofs of the management of the affairs of the canal.

I think, however, that enough appears to entitle the complainants to an account.

The decree below dismissed the bill, which, if affirmed, leaves the complainants without remedy for that which is admitted to be due them. Whereas, under the view here taken, this remedy would be left, but the company would not be deprived of the use and management of the canal, except gross negligence and misapplication of proceeds could be shown.

IN RE APPLICATION OF E. S. CONKLIN, EXECUTRIX, AND JOSEPH STAFFORD, ASSIGNEE, OF D. S. STAFFORD, DECEASED, FOR RE-ISSUE OF PATENT No. 31,133, IMPROVED CULTIVATOR.

A patentee is not entitled to have his patent re-issued unless he shows by satisfactory evidence that the error he seeks to have corrected was owing to "inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," and states particularly wherein the inadvertence, accident, or mistake consisted.

The decisions of the courts sustaining patents against objections for want of such evidence rest upon the principle that it is the province of the Commissioner to determine whether sufficient evidence to that effect has been produced; and that his granting a re-issue is conclusive on that point, and is not open to revision.

The supreme court of the District of Columbia is not governed by this principle in determining an appeal from the decision of the Commissioner of Patents refusing a re-issue, but will require the same evidence of inadvertence, accident, or mistake that should have been produced before him.

If a patent is neither inoperative nor invalid, &c., and the patentee has omitted to claim anything which he has described, it is to be presumed that he has abandoned it to the public.

It being found that the omission in this case was not owing to inadvertence, accident, or mistake, it was presumed that it was intentional, and with the view of abandoning to the public the devices not claimed in the original.

The presumption was held to be materially strengthened because the applicant had waited eighteen years after completing his invention before applying for a patent, and after obtaining it had lived five years without ever intimating that it was defective; had, on the contrary, made several improvements for which patents were obtained under his direction; and the re-issue was not applied for until four years after his death, and the devices had meanwhile gone into extensive use.

The presumption was held to be strengthened, also, by evidence that the devices sought to be introduced in the re-issue had been in use before the original application was filed, although the evidence might not be sufficient to show want of novelty.

In determining an appeal from the Commissioner of Patents, the supreme court of the District of Columbia will look only into the reasons of appeal, and into the records and proceedings in the case which are applicable to those reasons. (OLIN, J., dissenting.)

STATEMENT OF THE CASE.

This is an appeal from the decision of the Commissioner of Patents on the application of E. S. Conklin and Joseph Stafford for a re-issue of letters-patent granted to D. S. Stafford January 15, 1861. Stafford, the original inventor, died in 1866, and his widow, who is now Mrs. Conklin, and Joseph Stafford his assignee, file this application for re issue, in which they make seven claims, five of which were allowed by the Commissioner and the other two were disallowed on the ground that Stafford had abandoned them to public use before the original patent was issued.

The reasons of appeal are as follows :

1. Because the Commissioner erred in refusing the claims, in absence of any proof of any voluntary act, fact, or declaration of abandonment or intention of abandonment on the part of the inventor, and because there can be no abandonment presumed in force of law which will defeat his right to a patent.

2. Because the Commissioner erred in refusing the claims on presumption of abandonment arising from lapse of time; the grant of other patents within two years of the original application, and from defects in the original patent which are now sought to be remedied by the present amended specifications.

3. Because the Commissioner erred in refusing the claims by reason of alleged public use between the date of the invention and the application for the patent, without any evidence to show that such public use was with the knowledge or consent of the inventor.

4. Because the evidence cited by the Commissioner in his decision is insufficient to establish the fact of public use with or without the knowledge or consent of the inventor, and should not outweigh the evidence produced on the part of the applicants in this respect.

5. Because under the law nothing within the scope of the patentee's invention, which is described or shown in the specification or drawings of the original patent, though not claimed therein, passes to the public by reason of such defect; hence the legal representatives of D. S. Stafford are

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entitled to the re-issued patent for his invention as prayed for, and such protection during the unexpired term of the patent as the law affords, the decision of the Commissioner to the contrary notwithstanding.

A. McCallum and E. L. Stanton for appellants.

Marcus S. Hopkins for the Commissioner.

Mr. Justice MACARTHUR delivered the opinion of the court :

The appeal in this case is from a decision of the Commissioner of Patents, refusing to grant a re-issue of a patent to the representatives of a deceased inventor. The refusal to allow the re-issue is placed by the Commissioner on the ground that the claims for which the re-issue is denied have been abandoned to the public use, and are therefore not patentable. The facts of the case are as follows :

Daniel S. Stafford made application for letters-patent August 30, 1860, for a new and useful improvement in corn-cultivators, which he described in his specification as that kind of cultivator that can be raised or lowered, or turned to the right or left by the operator, from his seat on the machine, so as to adapt the machine for passing over or turning to one side of an obstruction, or to cause it to follow the crooks in the rows of plants. And this is followed by an elaborate description of the invention in all its details. The original patent was issued to him January 15, 1861, embracing three claims: first, the combination which enabled the driver to guide the machine so as to follow the crooks in the row of plants; second, the combination of the seat and the bent axle; and third, the long bent share-blades or cutters, for the purpose of throwing the loosened soil toward the plants.

In 1866 Daniel S. Stafford died, and on the 13th of September, 1870, his assignee, and his widow, who has since married, and is now Mrs. Conklin, filed an application for a re-issue, embracing seven claims, five of which were allowed, and two

of which were rejected for the reason already mentioned, that Stafford had abandoned the subject-matter of such claims previous to the issuing of the original patent. These claims are in the following language :

“The combination, in a straddle-row cultivator, of two wheels, B, an axle, C, frame A, and series of plows G, arranged in two gangs, with a central space between the gangs, so as to till or cultivate the soil on both sides of a single row of plants, simultaneously, as set forth.

“Also the combination, in a straddle-row cultivator, of two wheels, B, an axle, C, frame A, series of plows G, arranged in two gangs, with a central space between the gangs, and a seat, E, for the driver, for the purposes set forth.”

The application for the re-issue was necessarily made under the 53d section of the revised patent-law of 1870, which seems to be the only provision in the statute authorizing the Commissioner to issue a new patent for the same invention. This section declares that whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner is authorized on the surrender of such patent to cause a new one to be issued with corrected specifications. It will be seen by the terms of the statute that, in order to entitle a party to the re-issue of a patent, it is incumbent on him to show that it is inoperative or invalid, by reason of a defective or insufficient specification, or that the patentee had claimed more than he invented, and that the error had arisen by inadvertence, accident, or mistake, and without any fraudulent intention. Unless these circumstances exist in an application of this character, I can find no authority by which the Commissioner can re-issue a patent, and as he is an officer of special and limited power, his action must be restricted to the particular cases mentioned in the statute. I refer to these requirements of law because, if the original patent is neither inoperative nor invalid, and if no error has been occasioned by accident or mistake, there must be a presumption of law and fact that

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the patentee has abandoned to the use of the public everything which he may have invented, but which he did not include in his claims and specifications. The law presumes that every one who applies for a patent will embody his invention in specifications sufficiently definite to preserve as much of his discovery as he desires to protect by a patent. If from mistake he has overlooked anything within the scope of his invention, he may surrender his patent on that ground, and claim a new one in accordance with amended specifications. The party asking this relief must be denied it, unless he brings himself within the statute. When he knows all the facts relating to his own case, but through culpable negligence or misconduct has failed to claim all of his discovery, the law will not extend its aid to him, but will leave him to enjoy only such limited advantages as he has actually secured. The law reserves its remedies for the careful and vigilant who may have been misled from any of the causes mentioned in the statute. Courts of equity very often grant relief in cases of mistake, when a meritorious case is established by the pleadings and proofs, but the remedy is regulated by well-established rules of law, and undoubtedly Congress had the same rules in view when it extended this remedy to similar cases, under the patent-law which they enacted.

It is conceded that the Supreme Court has decided in several cases that the granting of a re-issued patent closes all inquiry into the the existence of inadvertency, accident, or mistake. A presumption then arises, that the proofs have been regularly made, and that they were satisfactory. "No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency." *Railway vs. Stimpson*, 14 Pet., 459; *Seymour vs. Osborne*, 11 Walk, 542.

In the case at bar no such presumption arises, for the patent has not been issued, and the proofs are before us to be examined and weighed, and we are called upon, as preliminary to the granting of the patent, to judge of the sufficiency and competency of the proofs to sustain the application, in conformity to the essential requisites of the statute.

The decisions referred to can have no application to an appeal of this kind.

In this case, Stafford during his life-time never pretended to any one that his patent was inoperative, or that the specifications were defective in any respect, or that he had omitted or added anything accidentally or by mistake. On the contrary, he always claimed for it the highest merit and practical utility. The evidence in the case of *Sayles vs. Hopgood*, used by consent on this application, establishes beyond any doubt that it was a valuable invention, and, as one of the witnesses expresses it, a strong, durable, and efficient farm-implement. It appears that more than 15,000 of the machines had been manufactured under the patent up to the time of his death, in 1866, and sold to the public. Another circumstance of much significance is not to be overlooked in this connection, and it is, that, after the original patent had been obtained, Stafford made further improvements upon the same cultivator, and for one of these he procured a distinct and independent patent. About three weeks before he died he gave his brother a description of a model for another improvement, which was patented after his death; and during all the time he was employed in devising models of new improvements upon his invention there is not a particle of evidence tending to show that he claimed there was anything wanting in the specification which he had filed in the Patent-Office when he obtained the original patent in 1861. It seems quite clear, upon this state of the case, that Stafford never intended to patent more than he had carefully and definitely described in his original application, and that everything else which he might have invented up to that period was abandoned to the public. This intention is clearly indicated by his act and is as fully proved as it is possible to prove the purposes of one now dead.

It is noticeable that the application for the re-issue states none of the causes mentioned in the statute for which a new patent may be issued, and a careful examination of the proof discloses the fact that not a particle of evidence has been taken to sustain these prerequisites of the law. No presumption can prevail here that the proofs have been made, as would be the case if a patent had issued, and the only rational belief

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that can arise upon the case as it now stands is, that Stafford abandoned what he did not include in his specifications.

We are aware that the Commissioner has presumed abandonment from what he deems proof of public use of the invention for several years previous to the issuing of the original patent. While we may not be satisfied that a public use is shown of such a character as to establish abandonment, yet the testimony on this subject, taken in connection with the facts I have already mentioned, adds considerable force to the presumption that Stafford never intended to patent what is now claimed. He made his first machine in 1842, and it comprehended in a rude form all the elements of the combination for which in 1861 he obtained a patent. It was a two-wheeled straddle-row cultivator, with plows on each side, so as to cultivate a whole row at a time, with a seat for the driver, drawn by two mules, and did as good work as a single plow. To explain the delay which took place from his first machine in 1842 until he obtained his patent 18 years afterward, in 1861, the appellants claim to have proved by the testimony of several witnesses that during all that time Stafford was in poor health, and was greatly embarrassed in his circumstances; that he was employed from time to time in improving his invention, and constantly declared his intention to obtain a patent as soon as he could procure the means. Whether this was the real cause of delay or not, such a protracted period of reflection and experiment afforded him extraordinary opportunities to ascertain and describe his claim with precision and accuracy. There is no proof that he was not entirely satisfied with what he did. The application for the re-issue is not made until 1871, a period of nearly five years after his death, and thirty years after he had reduced his invention to a practical form. In the mean time at least one hundred distinct patents have been issued for cultivators, and the numerous manufacturers in the West and Northwest are respectively manufacturing on patents of their own. The art has probably received many valuable additions from the efforts of so many persons; but if the claim of these appellants be allowed, they would have a monopoly of every form of cultivator with wheels, axles, plows, and a seat for the driver. It would, indeed, be a patent for a cultivator gen-

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erally. Such a claim should not be assented to unless it can be shown with reasonable certainty that if, patentable at all, it has never been deserted and abandoned by the inventor.

We are of opinion that the decision of the Commissioner should be affirmed.

Some discussion occurred during the argument concerning the jurisdiction of this court on an appeal from a decision of the Commissioner of Patents. The 48th section of the act provides for the appeal, and the next section directs that the appellant shall file in the Patent-Office his reasons of appeal in writing; and the 50th section enacts that the court shall revise the decision appealed from, and that such revision shall be confined to the points set forth in the reasons of appeal. A majority of the court are of opinion that by a true interpretation of these sections we can only examine into the reasons of appeal, and the record and proceedings so far as they apply thereto, for the purpose of ascertaining whether the Commissioner has made an erroneous decision; and that we cannot revise the decision on any other ground than that upon which the application was rejected. In the case now under consideration the re-issue was denied for the reason that the inventor had abandoned to public use the subject-matter of his own two claims, and the appellants assign their reasons for appealing to be that the Commissioner erred in refusing the claims on the ground of abandonment. The issue is thus clearly defined in the mode designated by the law, and we are forbidden to set the decision aside on any other ground. Nor can we go into the record at large for the general purpose of seeing whether the decision is right on some other ground not passed upon by the Commissioner, nor stated in the reasons of appeal. It has been suggested that a case may occur in which the true grounds of error are not set forth in the reasons of appeal, and yet the decision be sustainable on some other ground. It is, however, a sufficient answer to this view that it is not our duty to put a forced construction on statutes to remedy supposed evils. Besides, if the party wishes to test his general right to a patent, he can do so under the 52d section, which declares that he may have a bill in a court of equity if he has been refused a patent by the Commissioner.

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We have deemed it proper to dispose of this matter in the present case for the purpose of settling the practice on a disputed point in this class of cases.

Mr. Justice OLIN concurred in the judgment to affirm the decision of the Commissioner, but dissented from the opinion that the court could only consider the reasons of appeal, and expressed himself on that point as follows :

I will proceed now to consider the appellate power of this court when sitting in review of a decision made by the Commissioner of Patents.

Section 48 enacts that if such party, (any party,) except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the supreme court of the District of Columbia, sitting in banc. Section 49 further enacts, that when an appeal is taken to the supreme court of the District of Columbia the appellant gives notice thereof to the Commissioner, and files in the Patent-Office, within such time as the Commissioner shall appoint, his reasons of appeal, specifically set forth in writing. Section 50, it is further enacted, "that it shall be the duty of said court, on petition, to hear and determine such appeal, and to revise the decision appealed from, in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint, notifying the Commissioner of the time and place of hearing; and the revision shall be confined to the points set forth in the reasons of appeal. And after hearing the case, the court shall return to the Commissioner a certificate of its proceedings and decisions, which shall be entered of record in the Patent-Office, and govern the further proceedings in the case." These are the only provisions, so far as I can discover, that regulate the appellate powers of this court upon the hearing of appeals from the decision of the Commissioner of Patents, except what is contained in section 51, which provides that on receiving notice of the time and place of hearing such appeal the Commissioner shall notify all parties who appear to be interested therein, in such manner as the court may prescribe. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case.

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The provisions of the statute I have now quoted have been the subject of much debate and discussion among the members of this court, and, so far as I can learn, I compose a very small minority in my views as to the true meaning and proper construction of these provisions.

These provisions seem to me to combine the practical operation of a bill of exceptions and that of a writ of error.

First, the appellant has his bill of exceptions, in this way: He is required to state in writing the grounds upon which he appeals to this court from the decision of the Commissioner. If the court, looking at the whole record, can see that the grounds or reasons of appeal are not good or tenable, the decision of the Commissioner must be affirmed, even though the court looking through the record should discover that, in its opinion, the Commissioner decided wrong, yet as the party appealing to this court had not assigned the true cause for which the judgment of the Commissioner should be reversed, his decision should be affirmed. This is the precise office of a bill of exceptions, in which the party excepting can only obtain a reversal of a decision or judgment by pointing out the precise question upon which the court, or, as in this case, the Commissioner, erred. If the appellant fails to do that, the judgment must be affirmed. But on the other hand the Commissioner, who represents the public, stands in the relation of a party to a writ of error, upon which the court, having the whole record before it, will give such judgment as, upon the whole consideration of the case, ought to be given. In other words, that the only limitation of the powers of this court on appeals is a limitation of its powers in reference to reversing the decisions of the Commissioner for any other ground than that set forth in the reasons of appeal assigned by the appellant; but that, as to every other question arising from the record, this court is at full liberty to look through it and judge whether the decision made is right. If this be not so, what is the object or propriety of sending to us all the proceedings in the case as fully as they were before the Commissioner?

**MATTHIAS PABST vs. TRUSTEES, ETC., OF ECO-
NOMICAL BUILDING ASSOCIATION.**

IN EQUITY.—No. 2680.

- I. The advance of money made by a building association to one of the stockholders upon the shares which he owns is not a loan of money, but a purchase of such stock, and is therefore not affected by usury, and an account rendered by the association in which such advance is charged as a loan, is erroneous.
- II. Where the constitution of the association provides that no stockholder shall be permitted to withdraw who has received any portion of his stock in advance until the same has been fully repaid, he is entitled to withdraw on paying up any balance due by him on a settlement of the account, and it is repugnant to equity, in making such settlement, to aid in enforcing fines and penalties of an oppressive character, such as are found in the constitution of this association, and these may be properly excluded from the account.

STATEMENT OF THE CASE.

The complainant was a stockholder in the Economical Building Association of the city of Washington. Its constitution requires every stockholder to pay one dollar per share a month until the funds thus raised shall divide \$200 to each share, less thirty per cent., when the association shall close up. In case the monthly dues are not paid, there is to be charged thereon a fine of ten cents a month on every dollar behind for such neglect. The following portions of the constitution are given in order that the scheme of the institution may be understood.

The 7th section of article 2 is expressed in the following language:

“Stockholders wishing to withdraw from this association shall, after giving ten days’ written notice to the secretary, be entitled to receive from the treasurer the amount of dues actually paid in, without interest if withdrawn within the first year, and six per cent. interest per annum if withdrawn at any subsequent period, first deducting a portion of all losses and all fines and forfeitures so incurred: *Provided*, That no

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stockholder shall be permitted to withdraw who has received any portion of his stock in advance from the association until the same is fully repaid: *Provided further*, That not more than one-half of the amount of money paid in at any monthly meeting shall be available for the payment of withdrawals."

Article 8 in regard to advances:

"SEC. 1. Each and every stockholder for each and every share of stock that he or they may hold in the association shall be entitled to purchase an advance of stock of two hundred (\$200) dollars from the funds of the association, and no more: *Provided*, That not more than ten shares shall be sold at any one bidding.

"SEC. 2. Whenever the funds of the association shall warrant it, one or more advances shall be disposed of by the secretary to the highest bidder at the regular monthly meeting of the stockholders: *Provided*, The same shall not be sold under thirty per centum, and when it shall cease to sell at the minimum rate, then the board of directors are authorized to redeem stock. In the event of any money being in the hands of the treasurer for the redemption of stock, then the board of directors shall place the names of the stockholders who have not bought out in a box, and draw therefrom as many names as there is money in hand to redeem the same number of shares of stock, and the person whose name shall be drawn may, at his option, either take the amount paid in by him, with six per cent. interest per annum, or may take an advance at thirty per cent. premium.

"SEC. 3. Whenever a stockholder shall purchase an advance he shall pay or cause to be deducted the premium offered by him or them for the same, and shall secure the association by bond, deed of trust on unincumbered real estate, (*Provided*, Real estate conveyed by a tax-title, unless the title shall have been perfected, shall not be received as security,) and policy of insurance, the policy to be assigned to the trustees upon the trust for such amount as the board of directors may deem sufficient to cover the amount advanced, with all fines, costs, and charges which may accrue thereon.

"SEC. 4. All costs and charges for drawing, acknowledging, and recording said deeds, as well as all deeds of

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release, shall be paid by the stockholder receiving such advance, and he shall assign at lease one share of stock for every advance of two hundred dollars so purchased.

“SEC. 5. No stockholder shall be entitled to purchase an advance who is in arrears to the association, and no property shall be taken as security for such advance out of the District of Columbia.

“SEC. 6. Any stockholder purchasing an advance may have the privilege of taking to the extent of ten shares; and if the funds in the treasury be not sufficient to pay the whole, he shall be entitled to receive the balance out of the next month's receipts; and on failure or neglect on his part to give security required for such advance within one month after the date of purchase, the month's extra payment of \$1.00 per share shall be paid by such purchaser, and the money shall revert to the association.

“SEC. 7. Stockholders taking an advance from the funds of the association shall, from the time of purchasing such advance, pay to the treasurer two dollars per month for every share of stock on which such advance may have been made, (instead of one dollar as hereinbefore provided for those who have received no advance,) and if the same shall be suffered to remain unpaid for more than two months, the board of directors may compel payment by ordering proceedings on the bond and deed of trust according to law, at the expense of said stockholder.”

In 1868 the complainant owned 110 shares. Subsequently he purchased 30 shares more, and still later purchased 40 additional shares, canceling the 30 shares above mentioned, and leaving him the owner of 120 shares. Upon this he received advances amounting in all, as defendant claims, to the sum of \$10,770, from time to time down to February, 1872. The answers admit payment amounting to \$10,258. On receiving the advances he gave deeds of trust to secure the payment monthly of two dollars per share of his stock until the winding up of the association and of all fines that might be imposed, as is prescribed in section 6 of article 8 above cited. On the 29th day of February, 1872, the complainant having ceased to pay his monthly dues, he was served with a notice that if his indebtedness was not paid within ten days

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the property embraced in the trust-deeds would be advertised for sale. The bill is filed for an injunction to enjoin the sale and for an account. He claims that he has paid money enough into the association from time to time, upon a true statement of his account, to cover and equal his indebtedness, and that he wishes to withdraw from said association. He also insists that the advances were loans at a usurious and exorbitant rate of interest, and that the fines and usurious interest should be deducted, and whatever the balance is he is ready to pay the defendant.

An account was stated by the auditor showing \$7,459.10 balance in favor of the association. Exceptions were filed by the complainant to the report, and three of them were sustained, and a decree made in part as follows:

“And it is further ordered that the cause be referred to the auditor of the court to state the account between the parties, under the following instructions: he is to charge the plaintiff with all amounts received by him from the defendants, with legal interest thereon, commencing from the time each loan was made until the 1st day of March, 1872, and also with \$40 paid by defendants for insurance, with interest thereon, and rejecting all fines; and he is to give credit to plaintiff for all moneys paid by him to defendants, with legal interest, from the date of each payment until the 1st day of March, 1872, and then strike the balance, which balance, if any there be, shall bear legal interest, beginning on and from the 1st day of March, 1872, until paid.

“And it is further ordered, adjudged, and decreed, that John B. Blake and Moses Kelly, trustees, be, and hereby they are, enjoined and strictly prohibited from proceeding with the sale of the real estate referred to in these proceedings until further order of this court.”

The decree is now before the general term on appeal.

William F. Mattingly and *F. Schmidt*, for complainants, presented the following brief:

In this case the complainant received from the defendant about \$10,770, and in about three years' time paid back \$10,258. The defendant claims that the complainant still

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owes \$7,579.10. This is about seventy per centum interest for eighteen months, or at the rate of forty-six per cent. a year.

The plaintiff claims that this contract is usurious. It has every element of usury. It is a loan of money. Its payment is secured. An illegal rate of interest is reserved. If this is so, no disguise will prevent its being so adjudged. *Lloyd vs. Scott*, 9th Peters, 408. *Thyson vs. Ricard*, 3 H. & J., 109.

The cases of annuities relied on by the defendants have no bearing upon this question, because the repayment of the principal beyond all question is secured to the association. Its success and life depends upon it. As to annuities see 2 Blackstone, 461, and *Lloyd vs. Scott*, *supra*.

The English cases relied on by the defendant to show that transactions of this character are not loans, but dealings between partners, are cases under statute law exempting them from the consequences of usury, and regulating the rights of members.

Fleming vs. Self, 27 Eng. L. & Eq., 493, was *Seagrave vs. Pope* over again between the same parties, and the plaintiff in redeeming was allowed the same profits on his shares as withdrawing members.

The case in 25th Barb., cited on defendant's brief, was based upon the statute of New York, exempting building associations from the usury laws.

The case in 21 Georgia was also expressly decided upon the law of that State; and an examination of the case will show that the reasoning and opinion of the court upon the merits of the case were against the association.

Franklin Building Association vs. Marsh, 5 Dutch., 225, is also relied upon by the defendant. The court in this case sustained the validity of the mortgage under the law of New Jersey, which is exceedingly liberal. But in its opinion cites the language of the Lord Ch., in 27 Eng. L. & E., *Fleming vs. Self*:

"The gain to the society arises mainly from the high rate of discount, which members in want of money are ready to give. In truth, the whole scheme is but an elaborate contrivance for enabling persons having sums for which they

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have no immediate want, to lend them to others at a very high rate of interest."

"It might have been further said that these associations are but organized societies of legalized usurers, and that by their operations the investments of the members are absorbed by the usury paid to those more able."

33 Barb., 103, *Melville vs. Am. Ben. Bg. Association.*

The contract in this case was prior to the act of 1851; but the decision of the court was long afterward. The plaintiff received about \$3,500, and executed mortgage for \$4,693. Payments \$84 per month until the termination of the association.

The court says: "Whatever aversion may be naturally felt to declaring a contract void for usury when the excess is but small, there should be no hesitation in pronouncing such a contract as this within the law against usury."

"By calculation it is shown that the association could not terminate in from less than five to eight years, while probably it would continue longer than eight years; and that \$84 per month would pay up principal and interest at seven per centum by plaintiff in about four years."

"Upon these facts I am forced to the conclusion that these transactions were intended to be loans to the plaintiff at more than seven per cent. interest, and that such mortgages and agreements are usurious and void. The English cases cited by defendant's counsel are distinguishable from the present in that all those cases arose out of transactions of associations formed under and authorized by statute."

The English cases referred to are the same as cited by defendant's counsel in this case. 14 Legal Int., 237, *Kelly vs. The Accommodation Saving Fund and Loan Association.*

Lourie, J.: "If these loan societies usually deal on such terms, the profits which the keen calculators among them make out of the simplicity and credulity of their less knowing associates, will not be sufficient to shield them from the charge of using their associate power to grind the faces of the poor, and perhaps of being instituted under the garb of benevolence when their real purpose is far different."

"It seems to me that the law refuses to enforce agreements so unconscionable. Injunction allowed."

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24 Conn., 147, the *M. & W. Mutual Savings Bank and Building Association vs. Wilcox et al.*

In this case the contract which provided for a bonus of $\frac{3}{4}$ of one per cent. per month in addition to 6 per cent. interest was adjudged usurious, although the charter authorized the charging of a bonus in addition to legal interest. 12 Rich., 134, Eq. Rep., *Columbia Building Association vs. Ballinger*. Ballinger borrowed \$2,000 on ten shares of stock, received \$1,300, and was to pay \$20 per month.

O'Neill, C. J.: "*How the contract which has thus earned more than the principal in a period of a little more than four years can be anything else than usurious is difficult to conceive. Indeed, it must task and has tasked human ingenuity in every tribunal when the question has been presented, to find the reasons whereby such a contract could be sustained.*"

41 Pa., 478, *Houser vs. Herman Building Association*, Lourie, C. J.:

"A woman made this mortgage, and it is one of the hardest we have seen of these building-association loans. The premium contracted for is sixty-eight per cent., and it is sought to be enforced at the end of three years, when the premium and legal interest on the nominal principal would make an interest of thirty-three per cent. per annum on the actual loan."

"No wonder the woman applies to us for relief, and we have already many times decided in other cases that she is entitled to be discharged on payment of the actual amount borrowed with legal interest." (See Wrigley on Building Associations, 64, 65, and "How to Manage Building Associations," by the same author, page 97, *et seq.*)

Walter D. Davidge and Walter S. Cox, for defendants, argued that—

Whether the transactions in question are usurious is the first inquiry.

It is well settled that a debt payable in future may be purchased or discounted at any rate without violating the statutes against usury, (see *Nichols vs. Fearson*, 7 Pet., 103,) so that there could be no usury in the mere receipt by Pabst

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of a less sum than his future dividend, in full satisfaction of it, though the premium or discount exceeded six per cent. per annum.

Again, when the principal sum advanced or paid is not to be repaid, but only an annuity or periodical payments, though these exceed the legal rate of interest on the principal, and even though they would pay off the principal in a short time, there is no usury in the transaction.

Thus, where one gave £566 to have annually £130 for and during twenty-three years, the defendant had accepted £120 for the first year, and upon information against him in the King's Bench for usury, it was held not usury. *Finch's Case*, 1 And., 121.

Again, where one gave £100 for annuity of £20 per annum, it was held no usury. *DeGoad's Case*, Triv., 19 Eliz., in the Exchequer.

So, in *Fuller's Case*, Mich., 29 Eliz., 4 Leon., 208, where one gave £300 to another for an annuity of £50, assured to him for one hundred years, if he, his wife and four children should so long live, it was held not to be within the statute of usury.

So, where the defendant had given plaintiff £100, and for that he granted the defendant £20 for eight years annually, as a rent charge, and after that for two years more, if three men live so long, it was held that if the original contract was for a rent-charge it was no usury. *Simond vs. Cockerill*, Noy., 151. (See these and other cases in Comyn on Usury, 43 *et seq.*)

It will be observed that the transactions under consideration have both the features which have been held to exclude the taint of usury.

In the first place, the association becomes bound to pay *in futuro* to each stockholder, on winding up, a certain sum, which may be lawfully discounted.

In the next place, the principal sum received by the advanced stockholders is not to be returned, but only an annuity during the life of the association.

There have been sundry decisions directly on the subject of these societies.

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The first case on the subject was *Silver vs. Barnes*, 6 Bing., N. C., 180, decided in 1839.

It was a case of a mutual benefit society, in which the funds were put up at auction and advanced to the highest bidder, as in this case.

It was left to the jury to find whether there was a bona-fide partnership, or the whole arrangement was a contrivance to cover usury. They found the former. On a motion for a new trial, Tindall, Ch. J., said: "The judge who tried the cause thought there had been no loan, but merely an advance of partnership funds, in which the defendant was interested in common with the other members of the society. The defendant was interested in the fund when the money was advanced and when it was repaid. *The rules of the society are, in effect, a mere agreement by partners that their contributions shall be advanced for the use of one or the other, as occasion requires, and the transaction in question was not a borrowing by the maker of the note from the payees.*"

In the case of *Cutbill vs. Kingdon*, 1 Exch. R., 494, (1847,) the question of usury was not made; but Parke, B., in allusion to the statutes, in argument, referred to *Silver vs. Barnes*, as giving the true rule, and said: "There is no usury in benefit societies lending their money to their members at more than £5 per cent."

In *Wadley vs. Baker*, 6 Hare, 87, (1848,) the plaintiff had filed a bill to redeem, on payment of the sum advanced and legal interest.

Wigram, V. C., remarked that this *was not the case of a loan, but was a discount of the plaintiff's share, or an advance at its then present or conventional value, of his interest in the shares he held at the termination of the association*, and that plaintiff was only entitled to redeem on payment of all the future subscriptions on his shares until the dissolution of the association, its probable duration to be ascertained by calculation, and the future payments to be treated as due.

This case came on appeal before Lord Cottingham, and was affirmed; he holding also that all future monthly payments were to be paid at the time of redemption.

Seagrave vs. Pope, 1 De Gex, McNachten & Gordon, 783, (1850,) held the same doctrine, overruling the vice-chancellor,

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Knight Bruce, who had held the transaction in this case to be substantially a loan.

Lord Chancellor Truro said: "*It was not a loan, but an anticipatory payment, by way of discount.*"

In *Burbridge vs. Cotton*, 8 Eng. L. and E. Rep., 51, on a bill charging usury, &c., in a similar case, Sir. J. Parker, V. C., held that the case *was not that of a loan, but of an advance out of partnership funds, and not usurious.*

It is true that there is an English statute regulating building societies, which declares that a bonus or interest may be taken for an advance without being deemed usury. Some of the decisions, however, relate to what are called *friendly* or other benefit societies, not within the statute, and the same rule is held, showing that the statute is considered merely declaratory of the common law.

In the United States, statutes have been passed in several States, very much in the terms of the English statute. Some of them seem to authorize the transaction under the name of loans, and some of the societies are called loan associations.

And some of the decisions seem to recognize the same features in these dealings, before adverted to, as at variance with the theory of usury.

In the case of the *Citizens' Mutual Loan Association vs. Webster*, 25 Barbour, 263, decided in 1851, the court say:

"Whether the payments required to be made by this bond, in order to prevent forfeiture, will exceed the principal and legal interest of the amount advanced to the defendant, will depend upon matters not brought before the court. * * * If the *principal were payable absolutely*, there could be no doubt of the usury. *But it is not so.* And even when the mortgage has been foreclosed, and the moneys mentioned therein collected, they are to be applied only to the satisfaction of the dues, fees, and fines, and the surplus to be returned to the mortgagor."

And in regard to the increased monthly payments, they say: "*Besides, the higher rate of interest to be paid by each member of the association, the shorter will be the period required to complete the accumulation, on the completion of which the association was to terminate and the payments to cease.* The money collected by the association being the mutual property

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of all the members, and the greater the accumulation, the shorter being the period during which they will have to bear the burden of paying the moneys for the purpose of accumulation, *the ordinary objection to the collection of interest beyond the fixed rates is removed.*"

So in *Bibb County Loan Association vs. Richards*, 21 Georgia R., 592, (1857.)

The association had been incorporated expressly.

The court say: "Perhaps the best argument in support of this transaction, is the risk and uncertainty attending the result. Stock is put up at auction, the terms of sale are distinctly understood, and a purchase is made, taking into view all the contingencies attendant on the society during the few or many years of its existence.

"The stock may be worth a premium, or it may be a dead loss at the end of the operation. This, each must decide for himself. *If he concludes to take half now for then, that is, one hundred dollars for stock now, nominally worth two hundred dollars six, eight, or ten years hence, who has any right to say he judges foolishly?*"

So in the case of *Savings Association vs. Vandevere*, 3 Stockton, 382, (1857.)

The court considered a bond similar to that in the present case as *not importing a return of the principal, and therefore involving no usury.*

So in *Franklyn Building Association vs. Marsh*, 5 Dutcher, 225, (1861,) the statute providing that no premium given for the priority of loan or discount on the redemption of shares shall be deemed usurious, the court did *not consider the indefinite period for which the monthly installments might run, or the fact that they might exceed the money loaned and lawful interest, or the fact of the additional monthly payments, as affecting the validity of the transactions.*

So in *Shannon vs. Dunn*, 43 N. H., 194, (1861,) the court say: "If the transaction here is to be regarded as an advance to Dunn, it was from funds in which he had a common interest with the other members, and in which he continued interested, and *is to be regarded as dealing with the partnership funds rather than as a loan. If it is to be deemed a sale by Dunn for a present sum of his right to a future divi-*

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dend of five hundred dollars upon each share, it seems to be no more open to objections than somewhat similar transactions in post-obit bonds, annuities, stock-contracts, and negotiable securities. The contract does not provide for the return of the sum advanced at all events."

So in *Delano vs. Wild et al.*, 6 Allen, 1, (1863,) which was a suit brought to recover back alleged usury. The discount was as large as \$205 on the expected final dividend of \$500 per share.

The court say: "The money which the plaintiff received was not a loan, but an advancement to him by the company." "But no provision is made and no stipulation required for the repayment of the principal, because this is not the end and purpose intended to be accomplished by the parties in the transaction. For, though the proceeding is in form a sale or disposition of its funds, it is in fact a redemption by the company of the share or shares of the member who is nominally a purchaser of its money."

"Finally, the transaction between the parties cannot be deemed to embrace an agreement between them for the payment or reservation of usurious interest, because it was a dealing between them as partners in relation to a partnership fund in which they had a common interest." "In such case there can be no violation of the statute regulating the rate of interest." Citing *Silver vs. Barnes*, sup. (See, also, *Trask vs. Wheeler*, 7 Allen, 109.)

The case of *Robertson vs. American Homestead Association*, 10 Maryland R., 397, (1857,) was that of a petition by the appellee to sell mortgaged premises, &c.

CURIA. "The only remaining question to be considered is the objection to the decree on the ground that the mortgage is usurious in its terms. To this, it is sufficient to say that the contract, so far as it is disclosed in the record, contains no proof or element of usury. The only proof of the contract is to be found in the mortgage, which appears to be such an instrument as is contemplated by the act of 1852, the consideration for which was not a loan of money to be repaid, but the sum of \$460 paid to the mortgagor by the society as the ascertained value, in advance, of his shares of stock in the corporation, while the mortgage contains no

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covenant or obligation whatever for the repayment of said sum or any part of it. This court cannot regard the principal sum named in the mortgage as in any sense a loan, nor the contract, as it appears on the record, as usurious." "We adopt the views expressed in *Silver vs. Barnes*," &c. (See, also, *Oak Cottage Building Association vs. Eastman and Rodgers*, 31 Maryland, 556 (1869,) particularly as to the mode of settlement.)

In the case of *Columbia Building and Loan Association vs. Ballinger*, 12 Richardson's S. C. Ex. R., 124, though the ultimate decision was against the association, the reasoning of the chancellor, who was reversed, is more satisfactory than that of the other court.

He says: "By his contract with the association B. agreed, in lieu of the \$200 for each of his shares, to which he would be entitled when the funds of the association would suffice to pay that sum to each share of its whole capital stock, to accept the sum of \$2,000 in cash, reduced, however, by \$700, payable presently, and by the further sum of \$10, payable monthly thereafter, during the existence of the association."

"If this be a just conception of the contract, then the transaction was not a loan. It was an advance by anticipation to B. of the present value of what he would be entitled to receive upon shares he held at the termination of the association. If the contract be regarded as a sale by Ballinger, and a purchase by the association of his interest as stockholder, the inhibition of usury would have no application to such a transaction."

"The additional sum of \$1 to be paid monthly by B. on each share was as much a parcel of the premium for the advance as was the \$700." "The sum advanced B. never engaged to return. The bond he executed is not, and never was, intended to be a security for its repayment. Twenty dollars are required by the condition of the bond to be paid monthly. Of this sum it is in proof that the one moiety is for the primary monthly dues, and the other for the additional dues that arose upon the same shares for the advance upon them. The former moiety cannot be regarded as interest on the sum advanced to B., for the obligation to pay it existed prior to such advance, and was assumed by the original subscription for his shares. As to the latter moiety, it was in truth but parcel of the abatement

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agreed to be paid, and is no more interest than were the \$700 deducted at the outset."

It will be seen that in most of the States there are some statutory enactments which would relieve the cases from the objection of usury, even were they considered cases of loan. But the pertinency of the decisions above referred to is, that they declare the transactions in question not to be loans, but advances, discounts, and purchases.

As to the fines. It is true that equity will never interpose actively to enforce penalties and forfeitures. On the other hand, it will not, except in special cases, interfere to prevent their enforcement at law.

Especially, where there can be no clear estimate of the damages resulting from a breach for which the penalties are incurred, they refuse to interfere in either way. The very illustration given of this in 2 Story's Eq. Jur., sec. 1325, is the case of failure to pay installments on stock.

In the case of *Shannon vs. Howard Mutual Building Association*, 36 Md., it was held that the fine of a building association did not come within the principle which forbids a court of equity to lend its assistance to enforce the payment of fines and forfeitures, and that they ought to be allowed even where the court were applied to to foreclose.

Mr. Justice WYLIE delivered the opinion of the court:

Complainant was a member, and the defendants were either officers of or trustees for "The Economical Building Association" of this District. The controversy is as to the amount due by the complainant to the association; the latter claiming that on the 14th of February, 1872, Pabst was its debtor to the amount of \$7,579.10.

In the year 1868, complainant became first a member of the association, and in the course of the following year was the owner of 120 shares, the value of which was \$200 a share after all the payments should have been made up. The shares were to be paid for at the rate of one dollar on each, per month, or \$120 for the 120 shares. At this rate, his shares would all have been paid for at the end of sixteen years and eight months; but the actual value of the shares at any in-

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intermediate date depended upon the amount of payments which had previously been made on their account, and the business of the association and its future prospects.

At different periods during the year 1869, Pabst was advanced money by the association to the amount of \$10,770. This was a much larger sum than had been paid by him, at that time, on account of his shares, and, of course, a much larger sum than the shares were actually worth of themselves. But for the purpose of securing the association, he executed deeds of trust upon a valuable lot and its improvements in this city, and entered into obligations thereafter to pay to the association \$140 a month, or two dollars on each share held by him, until the whole amount of \$200 a share had been fully paid up, or the association brought to a close. The security given was not for the purpose of protecting a debt of an ascertained sum, but to compel the member obtaining the advance to meet his monthly payments. The money advanced was not a loan by the association, but a purchase of the member's shares, leaving him without further interest in the association, except his obligation to pay for them to the uttermost farthing, by monthly installments to the end. If the association should not be able to close up its business until the full completion of the period of sixteen years and eight months, the member who was advanced on 120 shares would have paid \$24,000 into the treasury, in an average period of eight years and four months.

But by means of the rapid compounding of interest by means of monthly loans, and the fund derived from fines for default of members in paying up their monthly dues, the period for closing the business of an association may be greatly abridged. For at whatever period the funds of the association will enable it to "divide to each share of stock the sum of two hundred dollars, less thirty per centum, the association shall determine and close." The more prosperous, therefore, is the association, the briefer its existence. It cannot be told for what length of time a member who has an advance upon his stock may be required to pay up his monthly dues. If the profits derived from compounding interests at high rates, and short intervals, and from fines, are large, this period will be short. If these profits are not large, it will be more remote.

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If the period be short, the member advanced will have the benefit, for by the close of the association he is relieved from making his monthly payments, and so, although no longer a member of the association, he is a sharer in its profits. If the time for closing up the business be more protracted, the member advanced loses that advantage; but under no circumstances is he required to pay beyond the nominal value of his stock.

Whether the arrangement shall turn out to be favorable to the member advanced, or otherwise, depends upon the success of the association. If it be successful, although no longer a member for some purposes, he shares in the profits; if unsuccessful, he may be a loser, but only to a limited extent.

We discover nothing, therefore, in the nature of this association which is unlawful, or in any wise necessarily more objectionable than other associations whose object is to make profit for their members. On the contrary, so far as it holds out encouragement to its members to save their earnings instead of squandering them in idleness and vice, it deserves to be supported and encouraged.

If, however, persons will join these associations in the expectation of borrowing money at pleasure, with no obligation ever to repay it, or subscribe for an amount of stock on which they are unable to meet the monthly dues, and thus subject themselves to fines at the rate of 120 per cent. per annum interest on the sums in arrear, disappointment and bankruptcy are to be expected.

There is another class, also, for whom these associations are unprofitable, namely, those who, having subscribed for shares and received advances for which they have mortgaged their homesteads, are afterward overtaken by sickness, or other inevitable calamity, depriving them of the power to meet their payments.

But for the laboring man, blessed with health, industrious, frugal, temperate, and resolute, these associations, if controlled by men like himself, are admirable institutions. Such a man, however, may win his fortune without their aid; and by joining them, takes the risk of wasting his time, and forming a connection with those who may defraud him of his

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property. So much as to the subject of building-associations in general.

In respect to the particular matter in controversy in the present case, the facts seem to be as follows: In March, 1869, Pabst was the owner of 120 shares of stock in this company, on which he, or those of whom he purchased, had been making monthly payments. At that time he obtained advances from the association amounting to \$10,770. These advances, be it remembered, were not loans. In order to secure the association for these advances, he executed two deeds of trust upon certain improved real estate in this city, both of the same form, from one of which the following is an extract:

“Whereas, heretofore, to wit, on the — day of —, in the year of our Lord one thousand eight hundred and sixty-nine, the said party hereto of the first part, by his writing obligatory of that date, acknowledged himself to be indebted to Nicholas Callan, the treasurer of said association, in the sum of twenty-two thousand dollars, and delivered the same to the said treasurer; and whereas the said writing obligatory is subject to a certain condition thereunder written to the effect that he, the said Matthias Pabst and his heirs, executors, and administrators, shall well and truly pay, or cause to be paid, to the treasurer of the association, and to his successor in office, the sum of two dollars current money per month for every share of stock which he, the said Matthias Pabst, holds in said association, commencing from the date hereof, and to be paid on the first Wednesday of each month thereafter, and also all fines and forfeits which may be imposed upon or incurred by him, by virtue of the provisions contained in the constitution, by-laws, and obligations of the said association, until the said association shall determine and close; and in order to secure the faithful performance of the condition in said writing obligatory mentioned, and stipulated to be performed by the said party hereto of the first part, he, the said party of the first part, hath agreed to execute these presents:

“Now, this indenture witnesses,” &c.

Here we find no obligation to pay any debt, but only that the party of the first part shall pay two dollars a month on

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each share of his stock, and all fines and forfeits, until the close of the association.

The deed further provides that, on default in making these payments for a period of four months, the trustee, on being requested so to do by the association, shall proceed to sell the property so conveyed in trust, &c.

The date of this deed is the 10th of December, 1869. The other is dated 21st December, 1870.

Each of them was given to secure the punctual payment of the monthly dues only from and after their respective dates. So that the payment of no dues, if any such exist, could be enforced even under the oldest of these deeds, except such as have accrued on and since the first Wednesday in January, 1870.

On the 29th of February, 1872, the secretary of the association gave a written notice to Mr. Pabst that his property would be advertised and sold under these deeds of trust unless his indebtedness to the association were paid within ten days, and inclosed a statement of amount claiming a balance due of \$7,579.10. To restrain such sale, and to obtain a settlement of his account with the association, the present bill was then filed.

According to defendant's answer, Pabst's

Advances amount to	\$10, 770
And his payments to	10, 258
	<hr/>
Balance, without calculation of interest	512

And yet defendant claimed there was still due \$7,579.10, and was threatening to sell the property unless this sum were paid in ten days.

The fines amounted to only \$522.45, and the insurance advanced by the association on account of Pabst to only \$40 more.

Conceding that from the first Wednesday of January, 1870, inclusive, to the 29th of February, 1872, when the account was rendered and payment demanded, that Pabst made default in every one of his monthly dues, the sum would have amounted to only \$6,000. But he had in fact paid within that time \$10,258 on account, and which ought to have been applied so far as was necessary to the payment

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of any of these monthly dues. In that case the dues would all have been paid, and no fines could have been laid; and a large balance have remained in the treasury of the association to the credit of Pabst, to be appropriated as he might choose to direct, or might be agreed upon. The great error in the account is in the item of \$8,807.50 charged to Pabst in June, 1869, as "loan on 110 shares."

Now, as we have seen, there was no loan in the case, much less any loan secured by either of these deeds of trust. The company took his stock and advanced him money in consideration of what had already been paid, and on the monthly dues yet to be paid by Pabst. All that Pabst had to do to pay that "loan," as it is here called, was to pay his monthly dues at maturity until the close of the association. The same error appears in a subsequent item of the account, where he is charged with "loan on forty shares of stock in December, 1870"—\$4,420.

If these were loans, they are not secured by these deeds of trust, and, besides, would be clearly usurious.

If they constitute the advances which were intended to be, and which in fact were, so secured, they ought not to appear in the account, so long as the property remains unsold. Under these contracts, Pabst was obliged only to the payment of his monthly dues at maturity. These had been paid up and more than paid, in advance. If he continue to pay them until his payments shall reach \$200 on each share, or until the company can wind up its business by paying that amount, less thirty per cent., his debt will be paid, because that is the contract of the parties, and agrees exactly with the scheme and constitution of the association. By a proviso to be found in the seventh section of the constitution of this society it is declared "that no stockholder shall be permitted to withdraw who has received any portion of his stock in advance from the association until the same is fully repaid."

At the argument of the case, counsel for the association were asked by the court to say what was their construction of this proviso, and seemed to be at a loss as to how it should be interpreted. Its language is certainly far from being clear. We are inclined to think it should be construed as if it had been written, any advances upon his stock, &c. In that sense

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it seems to have been understood by both the complainant and the defendants. The former is anxious to withdraw, and prays for an account. He is entitled to withdraw on paying up any balance due by him on a settlement of the accounts, and this was the precise effect of the decree which was passed by the court below. The fines or penalties for default in the monthly payments were excluded, and properly so, for, independently of the repugnance of a court of equity to aid in enforcing penalties of the oppressive character of those prescribed in the constitution of this association, the sums which the complainant had paid into the treasury of the defendant, from time to time, though not by regular payments of \$240 a month, far exceeded the sum which these payments amounted to at the time the account was rendered.

We have seen that on the 19th of February, 1872, the association rendered its account, charging Pabst with the full amount of the advances received by him, calling them loans, and threatening that it would proceed to have his property sold under the deeds of trust unless within ten days he should pay up these loans, as well as the other claims set out in the account. We have seen, also, that at this date Pabst was not in default as to his monthly payments, but, on the contrary, was entitled to a large balance to his credit, and that his property was not liable to sale under the deeds of trust so long as that was the condition of the account between him and the association. By this step the association elected to treat him as a borrower. He might have still claimed his right to continue his connection with the society, and have the amount then to his credit applied, from time to time, to the payment of his monthly dues until that amount was exhausted, and afterward to meet the monthly dues by new payments, and ultimately have the advances made to him repaid from his share in the profits of the association at its close. He has chosen, however, to take the association at its own word, and has come into court praying an account, and asking to be relieved from his connection with the association; and to this relief we think he is entitled upon the very terms prescribed in the decree of the court below, namely, that the advances shall be treated as loans, and his payments as credits upon them.

The decree at special term is affirmed with costs.

REPORT OF CASES

DECIDED BY

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,

AT APRIL GENERAL TERM, 1874.

SAMUEL A. COOMBS, BY HIS NEXT FRIEND, JOSEPH H. WATERS, vs. ANN O'NEAL.

AT LAW.—No. 9515.

- I. The construction of the will of David Peter by the United States Supreme Court, in *Peter vs. Beverly*, 10 Pet., 532, and re-affirmed in *Bank vs. Beverly*, 1 How., 134, accepted by this court as the law of that instrument.
- II. A power to sell real estate for the payment of debts and the education of children contained in a will, may be executed by a surviving executor, without reciting such power in the executing deed of conveyance; provided that the intent to execute the power is shown by the circumstances of the case.
- III. Circumstances stated which would be evidence of such intention.
- IV. *French vs. Edwards*, 13 Wall., 515, distinguished from the present case.
- V. By the omission of the usual recitals in a deed that the grantor is a surviving executor, and that it was executed in pursuance of a power, such deed, though not in an approved form, is not for that reason void.
- VI. A tax-deed is void where the advertisement of notice of sale contains no dollar-mark at the head of the column of figures.

STATEMENT OF THE CASE.

This is an action of ejectment brought by the plaintiff to recover the north half of lot No. 7, square 15, in the city of Washington. The bill of exceptions shows that the will of David Peter, who died seized of the lot in question, was probated and filed in 1812, and by it he directed that the proceeds of all his estate should be vested in his wife, Sarah Peter, for the maintenance and education of his children; that his debts should be paid as speedily as possible, and that his said children should receive a suitable education, for

which purpose he desired that a designated tract of land, with all his personal property thereon, should be sold and applied to that purpose, and so much of his city-property as might be necessary to effect that object, and he appointed his wife, Sarah Peter, his brother, George Peter, and his brother-in-law, Leonard H. Johns, the executrix and executors of his will.

The plaintiff then offered in evidence a deed from George Peter, one of said executors, to Jared L. Elliot, bearing date January 22, 1842, conveying said lot. To the introduction of this deed the defendant objected on the ground that it did not show on its face that said George Peter was surviving executor, nor did it recite the power or authority under which he executed the conveyance. The objection was overruled, and the deed allowed to go to the jury, and the defendant excepted. The plaintiffs thereupon introduced other deeds to trace their title to the premises from said Elliot, and also offered evidence tending to show that Mrs. Sarah Peter and Leonard H. Jones were both dead at the date of the conveyances to Elliot, and there rested the case.

The defendant then prayed the court to instruct the jury that upon the evidence they must find for the defendant; which prayer the court refused to give, to which refusal the defendant excepted. The defendant then offered a tax-deed from the authorities of the city of Washington and the proceedings preliminary thereto; to the introduction of this evidence plaintiff objected. The objection was sustained by the court, and defendant excepted.

The defendant here rested, and no further evidence being offered, the court charged the jury that if they believed from the evidence that the co-executors of Peter were dead at the time of the execution of the deed to Jared L. Elliot, that then the plaintiff had shown a legal chain of title and they must find for the plaintiff. To which charge the defendant excepted.

Mr. Justice MACARTHUR delivered the opinion of the court:

The objection to the deed from George Peter to Jared Elliot raises the question whether an executor, authorized by

the will to sell land belonging to the estate of his testator, can execute a valid deed of conveyance without reciting the authority by which he is directed to sell for the payment of debts and the maintenance and education of children. The other question growing out of that deed is, whether, upon the death of all the executors but one, he can sell without reciting his survivorship on the face of the instrument.

The will of David Peter, before us in this record, was also before the Supreme Court of the United States in *Peter vs Beverly*, 10 Pet., 532, and it was there decided that, although the will of the testator did not designate who should sell the land, the power to make the sale was given to the executors by implication, and as the testator had directed certain property to be sold for the purpose of paying his debts, and the education of his children, a power coupled with an interest was thereby created, and such power devolved upon the executors and the survivor of them for its proper execution.

In the *Bank of the United States vs. Beverly*, 1 How., 134, the construction of this will was again settled as in the former case, that the power to sell survived, and that the surviving executor was the proper person to fulfill that trust. So far, then, as relates to the right of the surviving executor to execute a sale of the property the point is determined, and the only controversy now is whether the power given by the will to sell need be referred to in the conveyance by which it is executed.

Mr. Chancellor Kent states the law as follows :

"The power may be executed without reciting it or even referring to it, provided the act shows that the donee had in view the subject of the power." 4 Kent Com., 334. In *Crane vs. Lessee of Morris*, 6 Pet., 620, Mr. Justice Story remarks: "Surely it will not be pretended that, in order to a due execution of a power, it is necessary that it should be recited or referred to in the executing instrument of conveyance. It is sufficient that the power exists, and is intended to be executed, and that intent is matter in *pais*, to be collected from all the circumstances of the case." And the same principle had been previously decided in *Carver vs. Jackson*, 4 Pet., 98, where the court hold that it is not necessary to recite a power to sell in a deed of conveyance from the donee of the power.

It may, therefore, be considered as a principle settled by the decisions of the Supreme Court, that a power to sell real estate may be executed without reciting it, provided that the intent to execute the power is shown by the circumstances of the case. This agrees with the decisions collected in Sugden's Treatise on Powers, vol. 1, section 8, commencing at page 412. The principle also receives a very full discussion in 2 Story Eq. Jur., section 1062, note 3, where it is stated "that all the authorities agree that it is not necessary that the intention to execute the powers should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds demonstrating the intention." The only question, then, in the case at bar, is, did the executor intend to execute the power in the conveyance he made to Elliot? That such was his intention was not contested at the trial. The land conveyed belonged to the estate of the testator; the Supreme Court had twice decided that he was the proper party to make the sale, and his deed can only have effect by treating it as an execution of the power. These facts would be sufficient, unless overcome by rebutting or explanatory evidence, to show that the sale was made in the exercise of the authority conferred upon the executor, and was therefore valid to pass the title to Elliot.

Against this view as to executing a power without reciting it, we are referred to the opinion of the court in *French vs. Edwards*, 13 Wall., 515, in which the following language occurs:

"Every deed executed under a power must refer to the power. As an independent instrument of the holder of the power, it would not convey the interest intended."

This observation was made in a case in which neither of the decisions mentioned were referred to in the briefs of counsel or by the court, and we are not at liberty to infer that they intended to overrule former adjudications without citing them, and to disregard the whole current of authorities upon the subject. Moreover, that case had reference to the recitals in a deed of a sheriff upon the sale of property by virtue of a judgment and execution, and it is perfectly well settled that in such a deed it is essential that the execution should be referred to with reasonable certainty. The sheriff has no interest

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in the property, and is clothed with no trust for his own benefit or that of others. He has only an authority given by law to perform an official act, and he must therefore refer to his warrant in order to show his right to sell land in which he has no estate. On the contrary, it has been decided and affirmed in reference to this will, that the executors took a power coupled with an interest, and where this is the case, we have seen that no actual reference to the power is necessary, where there is evidence of an intention to execute it. We are of opinion that the deed to Elliot may be justly considered as a valid execution of the power to sell.

In the next place, the jury were instructed that if they believed from the evidence that the co-executors of George Peter were dead at the time of the execution of the deed to Elliot, the plaintiff had then shown a legal chain of title, and they must find for him. We think the charge in this respect was correct. The deed is not in an approved form, but we do not think for that reason it conveyed no interest. By the omission of the usual recitals, the party claiming under it must produce evidence that it was executed in pursuance of the power, and that the grantor was the surviving executor under the will. The jury having passed upon these facts, the verdict is conclusive.

We think the tax-deed offered by the defendant was properly excluded on the ground held at the circuit, that the omission of the dollar-mark in the publication of notice of sale was such an irregularity as to render the proceeding void. *Wood vs. Freeman*, 1 Wall., 398.

**IN THE MATTER OF THE APPEAL OF HENRY W.
GOULD FROM THE DECISION OF THE COMMISSIONER OF PATENTS.**

- I. A claim for the combination of an advertisement, not described, with an anchored balloon, refused.
- II. The novel organization of co-operative elements or devices into a useful mechanism is invention within the meaning of the statute, whether the elements be individually old or new.
- III. The novelty and utility of a combination in its entirety as a unit are to be regarded, and it must necessarily, therefore, be a fixed and definite organism.
- IV. The mere discovery that it would be a good thing to attach advertisements permanently to balloons does not come within the law protecting a new and useful apparatus.

STATEMENT OF THE CASE.

The case is here on an appeal from a decision of the Commissioner of Patents refusing to grant a patent to Henry W. Gould. The claim of the inventor is in the following words:

“This invention relates to a new and improved mode of advertising goods, wares, and merchandise, telegraphic news, and disseminating information generally on political and other subjects, and it consists in an advertising apparatus composed of a balloon, and handbills, placards, and business-cards, containing information which may be important to the public, and one or more supporting cords or ropes, and a supply tube or pipe connected with a gas-reservoir, the same to be elevated to any desired altitude in the air, while the said gas-reservoir is stationary beneath; the arrangement being as hereinafter more fully described.”

This is succeeded by a description of the drawing accompanying the application, from which it appears that the essential elements in this combination are a supply-pipe, C, the advertisement D, the balloon A, for elevating and retaining the advertisement at the desired height; and the anchoring-rope B, to retain the balloon and advertisement within

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the proper distance and under the control of the person employing the device. The claim concludes thus :

“These advertising balloons I design to make of a diameter proportioned to the weight of the advertisements they have to carry, varying probably from four to eight feet, according to the particular purpose for which they are designed.

“I do not confine myself to the precise form or arrangement of any of the parts described, as they may be varied in many ways without departing from my invention.

“Having thus described my invention, I claim as new, and desire to secure by letters-patent—

“An advertising apparatus, consisting of balloon, A, one or more supporting ropes, B, and handbills or placards, D, and either with or without a supply-pipe, C, the whole arranged and operated substantially as described.”

The Acting Commissioner held that no invention is exhibited; that an anchored balloon, being an old and well-known device, and it being a common right, and a mere matter of judgment, to place an advertisement in any eligible position for displaying it, there is no more ground for a patent on account of the selection of an anchored balloon than on account of the selection of any other conspicuous object.

J. J. Coombs for the appellant.

Marcus S. Hopkins for the Patent-Office :

The history of the state of the art shows that balloons were invented in France in 1783. According to *Knight's American Mechanical Dictionary*, the latest and probably the best work of the kind, “balloons were introduced into the French armies at an early period during the revolution, and were used at the battles of Liege, Fleuris, 1794, and at the sieges of Mairts and Ehrenbreitstein, where they were found particularly useful, as only by such means could operations in the elevated citadel be observed.”

“Balloons were also employed by the French in the Italian campaign of 1859, at Solferino; and subsequently, during our own civil war, a small corps of balloonists was attached to the Army of the Potomac.”

"The late Prussian and French war, and especially the siege of Paris, gave rise to the most business-like and systematic use of balloons on record."

"Signals have been made, and notices, &c., have been distributed by means of balloons. One was invented by Mr. Shepherd and used in the Arctic regions in search of Sir John Franklin. The arrangement consisted of a number of printed packets of oiled silk or paper, upon which directions were printed, stating the latitude and longitude of the exploring ships, where they were going to, and the points at which provisions had been left. These were attached at proper intervals to a long slow-match made of rope dipped in niter and, as the balloon traveled over the country, the match burned gradually away, releasing the packets consecutively and distributing them over a wide range of country." Knight's Amer. Mech. Dict'y, p. 222. (See caption "Balloon," *ib.*, p. 457.)

The end sought in advertising, so far as selection of the means is concerned, is to attract public attention to the advertisement itself. This is always done by making it conspicuous either in its position or in its characteristics, or both; this may be said to be the principle of advertising. It is in obedience to this principle that the applicant has selected a balloon. The effect he obtains is precisely the same in kind that results from the selection of any other conspicuous object or position. If it differs in degree, that is immaterial. *Tatham vs. Leroy*, 1 Blatch., 474; *McCormick vs. Seymour*, 2 Blatch., 246. A balloon may be a better place for displaying an advertisement than a rope across a street, or a flag-staff, but both operate on the same principle. for the same purpose, in the same manner, and produce the same effect, except perhaps in degree. In *Cahoon vs. Ring*, Judge Clifford said: "Slight differences in degree cannot be regarded as of weight in determining a question of substantial similarity or substantial difference."

CARTER, C. J., delivered the opinion of the court:

This is an appeal from the decision of the Commissioner of Patents refusing to grant a patent to Henry W. Gould, of

Ashtabula County, Ohio, for what is called in his specification "an advertising apparatus." The apparatus is an anchored balloon, which is to carry an advertisement, either printed or painted on a balloon, or on some object which is to be suspended from it or from the anchor-rope. It is specified that more than one anchor-rope may be employed, but that is not material. A gas-reservoir and supply-tube are also described, but are not made essential elements of the contrivance. The essence of the alleged invention is an anchored balloon, bearing upon itself, or holding in suspension in any convenient manner, an advertisement for display before the public. The appellant says, in his specification, "I do not confine myself to the precise form or arrangement of any of the parts described, as they may be varied in many ways without departing from my invention." He claims "an advertising apparatus consisting of a balloon, one or more supporting ropes, and handbills or placards, and either with or without a supply-pipe, the whole arranged and operated substantially as described." The ground upon which a patent for the subject-matter of this claim is sought, is, that it comprehends a novel combination of elements constituting a useful apparatus. The subject-matter of invention upon which patents are granted is defined by statute to be "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." This alleged invention is presented as an apparatus or "machine," and is to be contemplated under that category of invention. It is well established that the novel organization of co-operative elements or devices into a useful mechanism is invention, within the meaning of the statute, whether the elements be individually old or new. *Buck vs. Hermance*, Fisher P. R., p. 251; *Evans vs. Eaton*, Peters C. C. R., p. 343; *Barrett vs. Hall*, 1 Mass., p. 474; *Pennock vs. Dialogue*, 4 Wash., p. 543; *Foote vs. Silsby*, 2 Blatch., p. 270. It is the novelty and utility of their assemblage and combination that is to be regarded, and such combination is to be considered in its entirety as a unit. *Dinmore vs. Schofield*, 4 Fish., pp. 154 and 155; *Watson vs. Cunningham*, *ibid.*, p. 531. It must necessarily, therefore, be a fixed and definite organism.

The obvious defect in the pending application is that the

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feature or element of the "apparatus" which gives it novelty, to wit, the advertisement, does not exist. There is no advertisement described in connection with the balloon, that the court may be advised whether the combination would be new and useful. It is not even claimed that the balloon or its fastenings have any peculiar fashion or adaptation to accommodate the suspension of advertisements. The old elements of this invention are left where the inventor found them; and the new elements, which give novelty to the matter, he has not discovered.

It appears to the court that this application, when stripped of its verbiage, is simply an application for a patent for the discovery that it would be a good thing to attach advertisements permanently to balloons; this certainly does not come within the law protecting a new and useful "apparatus." Even as a new and useful operation it might be doubtful.

The decision of the Commissioner is affirmed.

ELIZABETH KIMBRO, ADMINISTRATRIX OF SAMUEL KIMBRO, DECEASED, vs. THE FIRST NATIONAL BANK OF WASHINGTON, D. C.

AT LAW.—No. 9069.

- I.** Where a draft was issued from the United States Treasury upon the First National Bank of Washington, which was a depository and financial agent of the Government, payable to the order of Kimbro, who was a married woman then living in Tennessee with her husband, and the draft was delivered by the Government to the agents of the payee, who had been employed to prosecute the claim against the United States, and the draft was cashed by a bank in Nashville, on a forged indorsement of the payee's name, and by it sent for collection to a bank in New York, by whom it was forwarded to the drawee in Washington, who paid it: Held, that such drawee was liable to the payee, although payment had not been demanded on her behalf until after said drawee had paid it, relying upon the indorsement as genuine. Held, also, that the liability of the drawee was not released by the circumstance that, on paying the draft, it was transmitted to the Treasurer of the United States, who acted upon the indorsement as genuine, and gave full credit for the amount of such draft in the account of the bank. Held, further, that the action would lie, notwithstanding the fact that the payee never had possession of the draft, and that it was on file in the Treasury Department when the demand of payment was made on behalf of said payee, and notwithstanding the fact that defendant, in paying said draft, upon such payee's indorsement, acted as the agent of the United States Government.
- II.** Where evidence is introduced impeaching the genuineness of the supposed indorsement, it is competent to submit the paper to the jury to show that it had been issued by the Treasury Department, and to determine if the indorsement was a forgery.
- III.** The acknowledgment of a power of attorney before the clerk of a county court, with the seal of the court affixed, does not raise a presumption of law that the instrument was executed by the person mentioned in the certificate of said clerk. Where there is evidence tending to prove and disprove a valid execution, the question must be submitted to the jury upon all the facts.
- IV.** If there is a valid execution of a power of attorney, it is a sufficient authority to the attorney to place the name of the payee on the back of the draft, and to receive the money thereon. Or, if the power of

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attorney was left in the hands of the attorney, to be used by him and he filled the blanks therein, and by that means placed the indorsement on the draft, it would be a good and valid utterance of the draft as against the payee, or those claiming under her.

V. If the husband, during his life-time, never reduced the draft to his possession, then, upon his death, it became absolutely the wife's property by survivorship; and if she has not waived her right thereto, the representative of the husband's estate has no interest in the cause of action.

VI. Where several instructions are refused, but the same points are fully given in other prayers that are allowed, there is no ground for exceptions.

STATEMENT OF THE CASE.

From the bill of exceptions it appears that this cause was brought to recover the amount of the following United States Treasury draft:

"Draft No. 9243, on War-Warrant No. 915, W. P."

\$3,414.] "TREASURY OF THE UNITED STATES,
Washington, March 9, 1867.

Pay to the order of Mrs. E. S. Kimbro, three thousand four hundred fourteen dollars.

Issued on requisition No. —.

F. E. SPINNER,
Treasurer of the United States."

"No. 9243. Registered March 9, 1867.

S. B. COLBY,
Register of the Treasury."

"The First National Bank of Washington, D. C.—W. H. H."

(Indorsements:) "Mrs. E. V. Kimbro, (erased,) Mrs. E. S. Kimbro, W. A. Lord.

Pay Thos. Eakin, esq., broker, 33 Nassau street, or order, for collection.

W. J. THOMAS, *Cash.*"

"Pay W. S. Huntington, cashier, or order.

THOMAS EAKIN, *Cashier.*"

"W. S. Huntington."

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The draft was given in settlement of a claim against the Government for property taken during the war, and the payee was then living with her husband in the State of Tennessee. This draft was delivered by the Government into the hands of Tompkins & Co., claim-agents at Nashville, Tenn., with whom Mrs. Kimbro had intrusted the prosecution of the claim. It was cashed by the Second National Bank of Tennessee upon the forged indorsement of Mrs. Kimbro's name. It was afterward forwarded to the Fourth National Bank of New York for collection, and thence to the First National Bank of Washington, where it was paid. The plaintiff gave evidence to prove that the husband of Mrs. Kimbro was *non compos mentis* at the time said draft was issued, and continued so until the time of his death; and that she was appointed administratrix of his estate, and in that capacity brought this action. Evidence was also introduced to prove that the draft had been regularly issued by the Government; that the defendant (the drawee) was a depository and financial agent of the United States, and that the funds of the United States, against which said draft was drawn, were then in the hands of said defendant; that no power of attorney accompanied the draft, and that the Government treated the name on the back of said draft as the genuine signature of Mrs. Kimbro; that said draft was returned to the Treasury Department by the defendant, and that the same was entered to the full credit of the bank in its account with the Treasurer on April 30, 1867. The plaintiff then offered to read said draft in evidence; the defendant objected. The objection was overruled, and the first exception taken.

Evidence was then given to prove that, in the spring of 1869, payment of the draft had been demanded of the bank and refused; and it further appeared that the draft had never come to the possession of either Mrs. Kimbro or her husband, and that at the time of said demand the draft was on file in the Treasury Department of the United States.

The plaintiff here rested, and defendant demurred to the evidence, and asked the court to direct the jury to bring in a verdict for the defendant, which prayer the court refused; and this refusal constitutes the second bill of exceptions.

The counsel for defendant read various depositions, among

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them one of Rees W. Porter, who was one of the partners of the said firm of H. Tompkins & Co., to which the following power of attorney was made an exhibit :

“POWER OF ATTORNEY.

“Know all men by these presents that I, Elizabeth V. Kimbro, of the county of Davidson, and State of Tennessee, have made, constituted, and appointed H. Tompkins & Co., Nashville, Tennessee, my true and lawful attorneys, for me and in my name, place, and stead, to demand, collect, and receive from the proper disbursing-officer of the Government the sum of three thousand four hundred and fourteen dollars, due me on the following-described draft, to wit, draft No. 9243, on warrant No. 915, dated Washington, D. C., March 9th, 1867, payable to the order of Elizabeth V. Kimbro, for thirty-four hundred and fourteen dollars, drawn on the Treasury of the United States, and payable at the First National Bank of Washington, D. C., hereby empowering and authorizing my said attorneys to sign my name upon the back-side of said draft, as an indorsement for the purpose of receiving the moneys due me on same, as my attorneys in fact.

Giving and granting unto said attorneys full power to —, and to do and perform any and all other acts touching these premises; hereby confirming and ratifying the same as fully as if I were personally present and did the same.

Witness my hand and seal this 15th day of April, 1867.

[SEAL.]

ELIZABETH V. KIMBRO.”

“Signed and sealed in our presence :

H. E. SMITH.

WM. C. NICOL.”

“STATE OF TENNESSEE,

County of Davidson :

On this 15th day of April, A. D. 1867, before me personally came Mrs. Elizabeth V. Kimbro, and acknowledged the signing and sealing of the above power of attorney to be her act and deed, for the uses and purposes therein set forth.

Witness my hand and seal.

[SEAL.]

R. S. NICOL,

Clerk Davidson County Court.”

{ 50-cent internal-revenue stamp. }
{ E. V. K., Feb. 26, 1867. }

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The defendant further offered evidence tending to prove that said power of attorney was duly executed and acknowledged before R. S. Nichol, clerk of the court of Davidson County, Tennessee, and the evidence of the cashier of the Second National Bank of Nashville, that William A. Lord, one of the said firm of H. Tompkins & Co., brought the said draft and said power of attorney to said bank, and, exhibiting said power of attorney as his authority so to do, indorsed the name of the payee of said draft on the back thereof, and that, relying on said power of attorney, his bank paid the amount of said draft to said William A. Lord. The defendant further offered evidence tending to prove that the said firm of H. Tompkins & Co. had paid to the said E. V. Kimbro, on account of said draft, \$920, and that the compensation first agreed on between Mrs. Kimbro and H. Tompkins & Co., for the services of the latter in regard to said claim, was ten per cent., but that afterward, and before the allowance of said claim, the rate of compensation was, by consent of both parties, raised to 33½ per cent.

In the winter of 1869, Mrs. Kimbro brought suit in her own name against the bank, in which she recovered a judgment, but the general term on appeal set it aside, for the reason that the plaintiff being a married woman, and the draft coming to her during coverture, is vested in her husband, and therefore the action could not be maintained in her name alone. He died, as already stated, before the commencement of the present action, pending which Mrs. Kimbro herself has departed this life, and the present plaintiff was appointed administrator *de bonis non*. The defendant offered the record of the case just mentioned in evidence for the purpose of showing that she had not waived her right to the survivorship of the chose in action in this litigation on the death of her husband. The plaintiff objected to the admission of this record, and the court refused to allow the same to be read; to which ruling the defendant excepted, and there rested the defense.

Several depositions were read by the plaintiff tending to prove irregularities in the office of the clerk of Davidson County, Tennessee.

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The testimony being closed, the defendant asked for the following prayers :

1. From the evidence in the case, in regard to the prosecution in her own name of the claim, which was the consideration of the draft in question, issued as it was to her in her own right, the jury are at liberty to presume that Mrs. Kimbro had authority to attend to all matters connected with said claim, and, therefore, to execute the power of attorney in evidence as "Exhibit A" of Rees W. Porter's deposition. **Granted.**

2. The presumption of law is that the power of attorney in evidence, being duly attested by the clerk and seal of the court of Davidson County, Tennessee, is a good and valid power of attorney, and the burden of proof is on the plaintiff to show that it is invalid. **Refused.**

3. If Mrs. K. had authority to execute the power of attorney, "Exhibit A" to Porter's deposition, said power of attorney was a sufficient authority for the firm of H. Tompkins & Co. to place her name on the back of the draft in question, and receive the money thereon, and, if they did so, the plaintiff cannot recover in this suit. **Granted.**

4. If the jury find the facts to be that the said power of attorney was executed and acknowledged, with blanks to be filled in with description of the draft, and the same was left in the hands of H. Tompkins & Co. to be used by them, and that they subsequently filled the blanks, and by that means placed the name of the plaintiff on the back of the draft, and thereby induced the defendant, or the party from whom the draft came to the defendant, to cash the same without notice of the facts that said blanks had been so filled up, the plaintiff cannot recover in this suit. **Granted.**

5. If the jury find that the power of attorney was executed and acknowledged with blanks for the description of the draft, and that the power so executed was left with H. Tompkins & Co. for use; then, as between this plaintiff and defendant, that power of attorney was sufficient authority for them to fill up said blanks with such description, and to use the same in uttering said draft, and that if they did so fill up and so use said power, the plaintiff cannot recover in this suit. **Granted.**

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6. That if, under all the evidence and instructions of the court, the jury find for the plaintiff, the amount of the verdict will be the amount of the draft, less the amount to be paid for prosecuting said claim and the amount paid the plaintiff to apply on the same. Granted.

7. That if the jury believe that the credit given to the defendant by the United States Treasury was given on the faith of the genuineness of the signature of Mrs. K., then the plaintiff must look to the United States for her remedy, and cannot recover in this action. Refused.

8. In the absence of other proof than that a note or draft is issued payable to the order of a married woman, it must be presumed that the meritorious consideration therefor sprung from herself and not from her husband, and if the husband dies without having reduced the note or draft to his possession, the absolute ownership thereof vests *eo instanti* in the wife, payee named in the note, and when the ownership of a chose in action has vested in one person, action thereon cannot be maintained in the name of another person, nor in the name of his representative, without proof of an actual assignment. Refused.

9. Unless the jury find from the evidence that the draft in question was presented to the First National Bank, and accepted by said bank, in favor of the plaintiff's decedent, they must render a verdict for the defendant. Refused.

10. The defendant, in payment of the draft in evidence, acted as the agents of the United States Government, and particularly of the United States Treasurer, and are not liable in this action. Refused.

11. If the jury, from all the evidence, find that in paying the draft in question the defendants acted as the agents of the Treasurer of the United States, then the defendants are not liable in this action. Refused.

12. If the jury believe, from all the evidence, that the draft in question was issued to Elizabeth Kimbro, upon a claim of hers against the United States, and that her husband, during his life-time, never reduced the said draft to his possession, then, upon his death, prior to the commencement of this action, the cause of action thereon became hers absolutely, and did not belong to the estate of the said husband, and if

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the jury are further satisfied that the said Elizabeth Kimbro has never intended to waive her rights of property therein, then the representative of her husband's estate has no interest in the subject-matter of this action, and the jury must render a verdict for the defendant. **Granted.**

13. If the jury find, from all the proofs in the case, that the draft in evidence was issued to Elizabeth Kimbro during coverture, and that prior to the commencement of this action her husband died without having at any time reduced said draft to his possession, then the action cannot be maintained by the representative of the estate of her deceased husband, and the jury must return a verdict for the defendant, unless they further find that, intermediate her husband's death and the commencement of this action, she transferred the cause of action herein to the estate of her husband. **Refused.**

14. Unless the jury find that Samuel Kimbro, at the time the draft in evidence was issued, was not of sufficiently sound mind to be capable of making a valid contract or attending to his business, the right of action in this case is barred by the statute of limitations, and verdict must go for the defendant. **Refused.**

15. If the jury find that, at the date of said draft, said Samuel Kimbro was of unsound mind, and if they further find that Mrs. Kimbro had right or authority to prosecute in her own name the claim in payment of which said draft was issued; then, without further evidence, it is competent for the jury to find that she had full right or authority to execute the power of attorney given in proof on the part of the defendants. And should they find she had not right or authority, and that she did execute and acknowledge the said power of attorney, whether the same was in blank or not, and delivered it to the firm of H. Tompkins & Co., and that one of the said firm wrote her name on the back of the draft, and that, relying upon such indorsement, the defendants paid the draft, the jury should find for the defendant. **Refused.**

The court granted the first, third, fourth, fifth, sixth, and twelfth prayers, and refused to grant all the others. Whereupon the defendant excepted to such refusal, after which the

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jury retired, and on returning rendered a verdict in favor of the plaintiff for \$3,414, with interest. The case is now here upon the foregoing exceptions.

J. Daniels and *M. Thompson*, for plaintiff, argued the exceptions as follows:

The first exception taken by the defendant is, that the court erred in permitting the draft to be read in evidence for the reason that said draft having been given to Mrs. Kimbro during coverture, and never having been reduced to possession by her husband, the right of action survived to her, and therefore she could not maintain the action for the benefit of the husband's estate.

The second exception, that the court erred in refusing to instruct the jury to bring in a verdict for the defendant, is based upon the same grounds as the first.

To these exceptions we reply, first, that the draft having been made to her, it was proper evidence to establish the claim. Second, that the choses in action of the wife, coming to her during coverture, vest absolutely *eo instanti* in the husband, without any act on his part to reduce them to possession. (See the opinion of this court in the case of *Kimbrow vs. First National Bank*, above referred to in the history of this case, decided December, 1870; see, also, 1st East., 432; 6 Johnson R., 112, Mass., 229; *Lighthouse vs. Penniman*, 2 Conn., 564; *Lightborne vs. Halladay*, 2d Eq. Ca. Ab., 1.

Second. That even if it were not so, the objection would fail in this case, as the husband was insane, or *non compos mentis*, at the time the draft issued, and remained so until death, and his estate could not be prejudiced by his not doing an act of which he was totally incapable.

Third. Even if the right of action had survived to her, she had a right to waive it in favor of the estate of her husband and her bringing suit in her official capacity as administratrix of her husband's estate is a fair legal presumption that she so intended.

Exceptions to the refusal of the court to grant the eighth and thirteenth prayers stand on the same ground as the first and second exceptions.

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The third exception is to the ruling of the court in refusing to allow the defendant to submit the printed record in the case of *Kimbrow vs. The First National Bank* (that is, the record of the former trial) to the jury as evidence.

There can be nothing in this exception, for the reason that the object for which this species of evidence was sought to be introduced, as stated by counsel in their brief, was to show that the former action, in which this record was made, was brought by Mrs. Kimbro in her own right. This fact appears in the pleadings in this case, and is a part of the declaration, or in an affidavit appended to it, which is equally conclusive of the fact, but it would not have shown that two actions were pending in this court by the same parties, for the same cause, and at the same time; if it would, it was certainly properly excluded, for such was not the fact, as is shown by the records of this court. This court said that the former action was commenced by the wrong party, plaintiff, and remanded the case to the court below, "to be proceeded in according to law," and nothing further was ever done in that suit, but a new action commenced, as the only legal way in which plaintiff could proceed. This was strictly in accordance with the order of this court remanding the case; and beyond this, the record, containing, as it does, statements of counsel, prayers to the court, exceptions to the rulings, &c., was not a proper document to be submitted to the jury as evidence in this case.

Fourth exception, that the court erred in refusing second prayer.

This power of attorney was executed by a married woman during coverture, without the consent or concurrence of her husband, in a State where the wife is incapable of making a contract, even as to her own property, without the concurrence of her husband; and much less could she dispose of her husband's estate without his consent, unless he had been declared insane, or of unsound mind, by a tribunal established by law, and there is no pretext here that such was the case. She could not have transferred this draft to a stranger by her own indorsement, and of course could not authorize another, by her written authority or otherwise, to do what she herself could not do. (See Code of Tennessee, section

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2486.) This power of attorney is a part of the record in this court, and it will be seen by inspection that the marks of fraud and irregularity are borne upon its face, and therefore it does not come within the rule stated by counsel; and the prayer was properly refused.

SEVENTH PRAYER.

The doctrine is well settled that, while the acceptor or drawee of a bill is not bound to pay it if the indorsement under which the holder claims is forged, and may compel the holder to prove the genuineness of the signature of the payee, yet if he does pay it, the real owner is still entitled to recover the amount as well from the holder as from the acceptor. (See Story on Bills of Exchange, sec. 451; *Canal Bank vs. Bank of Albany*, 1st Hill N. Y. Rep., 287; *Goddard vs. Merchants' Bank*, 2d Sanford Sup. Ct. N. Y. Rep., 247.) So in this case the First National Bank, defendant, might have compelled the Fourth National Bank, who presented the bill for payment, to prove the genuineness of the signature of the plaintiff and payee before payment; but as they did not take that precaution, they paid it at their peril, and must respond to the payee if her signature is forged or placed on the bill without her authority.

The payment of a draft or bill on a forged indorsement is equivalent to an acceptance. (See *Canal Bank vs. Bank of Albany*, 1st Hill N. Y. Rep., cited above.)

The defendant paid this draft on the strength of the indorsement of the Fourth National Bank of New York, and may recover the amount from the bank, and their duty was, when they found that they had paid the draft upon a forged indorsement, to have paid the plaintiff and made reclamation upon the Fourth National Bank of New York.

NINTH PRAYER.

The payment of a draft upon a forged indorsement, or without proper authority, is equivalent to an acceptance in favor of the rightful owner. (See authorities above cited.)

The relations of this defendant to the Government, so far as its deposits were concerned, were the same as existed between the defendant and any other depositor. The law

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gives the Government the right to designate certain banks as national depositories, and in banks so designated the Treasurer and other disbursing officers may make deposits from time to time for the convenience of business, and the case stands the same, so far as these parties are concerned, as though a paymaster in the Army or Navy or any other disbursing officer of the Government had drawn this draft. (See currency act, June 3, 1864, 13 Statutes at Large, 113.)

This is in the nature of an equitable action, and lies to recover money in the hands of the defendant, which he in good conscience ought not to retain. No stronger case could be presented to a court than this. It is admitted by the defendant that the plaintiff is not at fault. She has not received the money due her from the drawee of this draft. The defendant has got it and has not paid it to any person authorized to receive it; if he has paid it through his own carelessness to the wrong party, he alone must suffer.

The power of attorney could not aid them even though it had been properly executed, and obtained fairly in the ordinary course of business, (which is not the case,) because it is in evidence and admitted that no power of attorney accompanied the draft when it was paid, and the defendant did not know of its existence.

The defendant has received the money from the drawer of the bill and should pay it to the plaintiff. Byles on Bills, p. 45 and 32-43; *Stackpole vs. Arnold*, 11 Mass., pp. 27, 29; 16 Pick., pp. 347, 350; 12 Mass., pp. 173, 175; 22 Pick., pp. 158-161; 7 Wend., p. 68; 10 Wend., pp. 87, 271; Story on Agency, p. 147 and note 4; Collyer on Part., p. 365 and note 1; Story on Agency, 149 and note 2; Story on Agency, p. 154; Com. Dig. Attorney, 6, 11, 14, 15; Story, p. 155 and 42, 157, 160, and p. 204-5; Story, pp. 165, 170, 172, 199, 209, 166, 126, note 4, 133, and note 2, 430, 437.

A. G. Riddle and Francis Miller for defendants :

FIRST AND SECOND EXCEPTIONS.

The court erred in permitting the draft to be read in evidence, for the reason that said draft having been given to

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Mrs. Kimbro during coverture, and never having been reduced to possession by her husband, survived to her, and the action in the right of her husband cannot be maintained.

For the same reason the court erred in refusing to instruct the jury to bring in a verdict for the defendant, for the evidence of the plaintiff proved that if there was any cause of action against this defendant it was not in Whitman, but in the personal representatives of Mrs. Kimbro. "The right of the wife to *choses in action* coming to her during coverture survives to her, unless the husband reduces them to possession." 2 Kent's Com., *135; 1 Parsons on N. and B., 87; *Gallego vs. Gallego*, 2 Brockenbrough, 285; *Hayward vs. Hayward*, 20 Pick., 518; *Draper vs. Jackson*, 16 Mass., 480; *Poor vs. Hazelton*, 15 N. H., 564; *Fisk vs. Cushman*, 6 Cush., 20.

These authorities also show that the court should have granted the 8th and 13th instructions asked for by the defendant. Laws of Md., Ch. 101, Sub-ch. 5, Sec. 8; 18 U. S. Stat., 484; 18 U. S. Stat., 515.

THIRD EXCEPTION.

The court erred in refusing to submit in evidence the record of *E. V. Kimbro vs. The First National Bank of Washington*.

As appears by the affidavit of Mrs. Kimbro, accompanying the declaration in this cause, this was an action instituted by her *in her own right*, to recover the same money sued for in this case. The said action is still upon the docket of this court, undismissed and undisposed of in any way. The record was proof tending to show that Mrs. Kimbro had never, during her life-time, assigned her right of action to her husband or any one else, and should therefore have been submitted to the jury.

It was in proof that there were two actions now pending in this court against the same defendant, for the same cause of action, and as the one on trial could only be sustained on the hypothesis that Mrs. Kimbro's right of survivorship in the chose in action, which is the subject-matter of this suit, had passed in some way to the personal representatives of her husband, it was evidence proper to be submitted to the jury; if, indeed, it was not conclusive evidence that no such transfer had been made.

FOURTH EXCEPTION.

(a.) The court erred in refusing the defendant's second prayer. The signature of the clerk of Davidson County court and the seal of said court were proved by uncontradicted testimony.

(b.) The court erred in refusing to grant defendant's seventh prayer. This draft was made payable to Mrs. Kimbro by the Treasurer of the United States. She was an entire stranger to the bank, and had no right of action against the bank till the draft was presented and accepted by the bank. 2 Parson on N. & B., pp. 59-61, and notes. Till such presentation and acceptance, therefore, the transaction was solely between the bank and the United States. The obligation of the bank was to pay the money deposited with it in such manner as should be satisfactory to the Government. If it had been ordered to return the money to the Treasury, or to decline to pay the draft when presented, it would have been bound to obey. When, therefore, the draft was presented and paid, and transmitted to the Treasurer, and he recognized the fact that the bank had discharged its full duty to the Government, all responsibility on its part ceased, whether to the Government or to the payee of the draft. The payee being a stranger to the bank, the bank was under no obligation to know her signature, while the Treasurer was bound to do so. "The acceptor looks only at the handwriting of the drawer." 2 Parsons on N. & B., p. 590, and notes; 1 Parsons on N. & B., p. 321, and notes; *Smith vs. Mercer*, 6 Taunton, 76; *Price vs. Neale*, 3 Burrows, 1354.

The United States was bound to know the signature of their payee, and when the officers of the Treasury received the draft on the faith of her signature, and gave the defendant credit for it, they placed the Government in the position of a bank receiving counterfeits of its own notes, the loss of which falls on the bank, (*Bank of United States vs. Bank of Georgia*, 10 Wh., 333,) or, more nearly, of a bank which receives from a depositor a forged check of one of its own customers, and gives him credit in his bank-book. In such cases the depositor can sue the bank for the amount so passed to

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his credit, and recover. *Lery vs. Bank of United States*, 1 Binney, 30; same case, 4 Dallas, 234.

(c.) The court erred in refusing to give the defendant's ninth instruction. If the draft was paid by the defendant to a person acting without the authority of the plaintiff, then the draft was never duly presented, for "presentment must be made by the lawful owner, or his agent." 1 Parsons on N. & B., 339. Moreover, "a check payable on presentment cannot in the usual course of business be presented for acceptance." 2 Pars. on N. & B., 71. The drawee owes no duty to the holder until the check is presented and accepted. *Chipman vs. White*, 2 Selden, 412.

(d.) The court erred in refusing to give the defendant's ninth and tenth instructions. The 45th section of the act of June 3, 1864, (13 Stat., 113,) authorizes the Secretary of the Treasury to designate certain of the banks as national depositories and financial agents of the Government. As depositories, they were to receive any moneys of the United States that the officers of the United States were authorized or required to deposit with them. As financial agents, they were to transact such business as the Government might charge them with. Thus the First National Bank was the agent of the United States to pay Mrs. Kimbro. It did pay out the money on the draft in her favor, as such agent, and the ratification of the act of the agent by the principal made that payment the payment of the principal. According to the testimony of Mr. Tayler, the First Comptroller, the Treasurer might have drawn the draft in question either upon himself, or any assistant treasurer, or any United States depository, and in either case the mode of payment and of accounting, as between the Treasurer and his subordinates, and as between the Treasurer and the Government, was the same. Now, this could only be so on the hypothesis that the bank was acting as the *agent of the Government*, and that its act was the act of the Government; and if this is the fact, there can be no liability on the part of the bank to this plaintiff.

(e.) The court erred in refusing to give the defendant's fourteenth instruction. It appears from the record that the defendant pleaded the statute of limitations, to which the plaintiff replied that "the money was obtained by the defend-

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ant by means of fraud, and that said fraud was not discovered three years before this suit." To this replication the defendant demurred, and the demurrer was sustained. The plaintiff then replied that "Samuel Kimbro, the deceased, was at the time, and long before said cause of action accrued, *non compos mentis*, and so continued till his death;" upon which replication issue was joined. This issue, if found against the plaintiff, was decisive of the case, and the jury should have been so instructed.

(f.) The court erred in refusing to give the defendant's fifteenth instruction. It is evident that if Mrs. Kimbro had power to prosecute the claim in her own name, she had a right to execute the power of attorney in evidence, and the court so held in granting the defendant's first instruction. If the jury found that she did execute and acknowledge that power in full, as it now stands, and her name was indorsed on the draft by one of the firm to whom it was given, and the draft was paid by reason of that indorsement, the payment was valid.

Mr. Justice HUMPHREYS delivered the opinion of the court:

In March, 1867, a draft was issued from the Treasury of the United States on the First National Bank of Washington, D. C., payable to Mrs. E. S. Kimbro, for the sum of three thousand four hundred and fourteen dollars, issued on a war-warrant, which warrant was issued on requisition of the Secretary of War, March, 1867.

Mrs. Kimbro was the wife of Samuel Kimbro, and they resided at the time in Davidson County, Tennessee.

The First National Bank of Washington, District of Columbia, paid the amount of the draft after it had passed through a national bank in Nashville, Tennessee, and one in New York. The first indorsements bear the names of Mrs. E. V. Kimbro, which was erased, and Mrs. E. S. Kimbro. The plaintiff alleges that Mrs. Kimbro never indorsed or authorized any one to indorse the said draft, nor did Samuel Kimbro, the husband, indorse or authorize any one to indorse the same, nor did either of them sell or dispose of the same, or authorize any one to collect the amount of said draft. Suit was brought

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by the administratrix of Samuel Kimbro, after his death, to recover the amount from the defendant, and the suit revived in the name of the administrator *de bonis non*.

There was evidence tending to show that the name of Kimbro on the back of the draft was not the signature of either Mrs. Kimbro or Samuel Kimbro, and that the same was not authorized by either of them, and that neither of them had ever parted with the property in said draft, nor authorized any one to collect the same. The evidence further tended to show that the fact that the warrant and draft had been issued was not communicated to Mrs. Kimbro or to her husband until some time in 1869, but that the same had been concealed from both wife and husband by those who originally had acted as their agents in Nashville to present the claim to the War Department. After evidence had been introduced to prove that the draft had been issued regularly from the Treasury, and that the same had been paid by defendant, plaintiff was allowed by the court at the circuit to read the draft to the jury, to which defendant objected and excepted. We think the reading of the paper was competent and proper to show that such had been issued, and to determine if the indorsement was genuine, for that was directly in issue.

The defendant submitted fifteen prayers, six of which were given in charge to the jury at the circuit, and the remainder declined, and defendant excepted to the refusals. The second charge asked for was as follows:

“The presumption of law is that the power of attorney in evidence, being duly attested by the clerk and seal of the court of Davidson County, Tenn., is a good and valid power of attorney, and the burden of proof is on the plaintiff to show that it is invalid.”

A paper purporting to be a power of attorney, executed by Mrs. Kimbro on the 15th of April, 1867, was exhibited along with the deposition of one Porter, and evidence was introduced tending on the respective sides to sustain and contradict the genuineness of the execution of the same by Mrs. Kimbro. We do not see how the instruction asked could be proper. The execution of the paper was in issue, and there was no law requiring such an instrument to be recorded or giving

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force to such a certificate. No more weight was to be given to this than any other proof, and the jury must determine all the facts together, and give their verdict as they found the weight of evidence. Besides this, defendant had all benefit of every fact which the jury might find in the 3d and 4th prayers, which were given in charge. We do not think there was error in refusing to give the charge contained in the seventh prayer, nor in the eighth, ninth, tenth, nor eleventh. The twelfth prayer, which was given in charge, was full, and included all that was asked by the 13th, which it was proper to give to the jury. The fourteenth and fifteenth prayers were properly refused. The conclusion to which we come is that the motion for a new trial on the exceptions is overruled, and the judgment of the circuit court is affirmed.

BATES vs. DISTRICT OF COLUMBIA.

- I. The 26th section of the act of Congress to provide for a government for the District of Columbia designates a board of health, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; but it does not confer power upon said board of health to declare anything or any condition of things a nuisance, injurious to health, which was not a nuisance by the rules of the common law, or made such by some statute governing the District.
- II. Where the defendant and his ancestors had prosecuted continuously the business of manufacturing soap and candles in the same place for a period of more than forty years, it was held it could not be removed unless the facts upon which the question of nuisance depended were tried by due process of law, consisting of indictment and trial by jury; and it was also held that the board of health had no authority to pass ordinances under which the defendant was prosecuted by information in the police court for the purpose of recovering a fine or penalty for maintaining the alleged nuisance.
- III. Writ of certiorari is the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded or is proceeding to judgment without jurisdiction. In a case where the police court has no jurisdiction the writ may issue to review such proceedings, although the statute provides for an appeal where there is to be a retrial of the case.

STATEMENT OF THE CASE.

The question involved in this case arises out of the provisions contained in section twenty-six of an act of Congress passed February 21, 1871, to provide for a government for the District of Columbia, which section is as follows:

“That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a board of health, to consist of five persons, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof.

“2d. To make and enforce regulations to prevent domestic animals from running at large in the cities of Washington and Georgetown.

“3d. To prevent the sale of unwholesome food in said cities,

and to perform such duties as shall be imposed upon said board by the legislative assembly." 16 vol. U. S. S., pp. 224 and 225.

The board of health appointed in pursuance of the section of the statute quoted, in the exercise of the power supposed to be conferred upon it, passed a resolution or enacted an ordinance containing twenty or thirty sections in reference to a great variety of matters, but the only one necessary to be considered in this case is the following:

"Be it enacted that all establishments or places of business for boiling any offal, swill, bones, or tallow; crushing or grinding, or burning bones or shells; cleansing guts; making glue, varnish, or lamp-black; distilling liquors or alcohol, or other substances that may degenerate into noxious gases and odors within the limits of the cities of Washington and Georgetown, shall be deemed nuisances injurious to health; and any person who shall, within the limits of said cities, boil any offal, swill, bones, fat, tallow, or lard for any purpose, except that of cooking, or who shall enter into the business of crushing, grinding, or burning bones or shells, or cleansing guts, or making glue, from any dead animal, or part thereof; or storing or keeping any scrap fat, or grease, or any offensive animal matter; or shall hereafter establish or erect any manufactory or place of business for boiling any varnish or oil, or for distilling any ardent, alcoholic, or fermented spirits; or for making any lamp-black, turpentine, or tar; or for conducting any other business that may generate any unwholesome, offensive, and deleterious gases, smoke deposit, or any exhalation, shall be deemed guilty of keeping and maintaining a nuisance, and shall, upon conviction, be punished by a fine of not less than two nor more than twenty dollars."

For an alleged violation of this regulation or ordinance, an information was filed in the police court by William A. Cook, attorney for the District of Columbia, and A. K. Browne, attorney for the board of health, in substance charging that the defendant "did, in the city of Washington, on G street, between Sixth and Seventh streets, northwest, and near unto houses of divers good citizens there situate, and being unlawfully and injuriously, with force and arms, within the limits

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of the city of Washington, and within the jurisdiction of this court, *boil offal, fat, tallow, or lard, in an establishment or place of business, for the purpose of manufacturing soap and candles*, and did then and there store or keep scraps, fat, grease, or other offensive matters, in divers large quantities; by reason of which said establishment or place of business, divers noxious gases, odors, noisome, offensive, unwholesome smokes, smells, and stench were from thence emitted and degenerated, so that the air then and there was, and is, greatly filled and impregnated, to the great damage and common nuisance of divers good citizens of said District, residing and passing there, and contrary and in violation of an ordinance entitled 'An ordinance to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof,' passed May, 1871."

Upon the appearance of the defendant, he filed a plea to the jurisdiction of the court, which plea was overruled by the judge, and the further hearing of the case was postponed until the 6th of January, 1874. On the 5th of January, the day preceding the one set for the hearing, the defendant sued out a writ of certiorari, addressed to the judge of the police court, commanding him to certify and send his proceedings in the case to this court, with all things touching the same, as fully and entirely as the same remained before him, to the end that this court might do therein what of right ought to be done. In obedience to this writ, the judge of the police court certified and sent the papers here, and the counsel for the prosecution thereupon moved to quash the writ:

"1st. Because the board of health is a corporation created by and existing under the laws of Congress, and by virtue of such laws has exclusive power to pass ordinances, to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof, in said District.

2d. Because the police court of said District has full and exclusive jurisdiction of any and all violations of said ordinances of said board of health.

3d. Because the information filed in the cause in said police court by the District of Columbia, at the instance of the board of health, is properly brought, and ought not to be in the name of the United States.

4th. Because the said police court is a court of record; and "from any sentence or judgment of said police court there is a full and efficacious remedy for the defendant, if aggrieved by such sentence or judgment, by appeal to the supreme court of the District."

The case is now heard upon this motion to quash at the general term in the first instance.

William A. Cook and A. K. Browne for board of health.

The first three points argued on their printed brief are that certiorari will not lie when an appeal is provided for.

FOURTH.

The board of health is vested with full and exclusive power to determine and "declare" what "are nuisances" in the District "injurious to health," as well as "to provide for their removal;" and the mode which it has adopted of executing these powers by general ordinances or orders, including the imposition of fines and penalties through the intervention of the police and criminal court, is wise and correct.

The authority for the existence of the board, and for the exercise of its powers, is derived from the organic act:

"SEC. 26. *And be it further enacted, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a board of health for said District, to consist of five persons, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; to make and enforce regulations to prevent domestic animals from running at large in the cities of Washington and Georgetown; to prevent the sale of unwholesome food in said cities; and to perform such other duties as shall be imposed upon said board by the legislative assembly.*" 16 U. S. Stats. at Large, p. 424.

First. It will be observed that this board is composed of persons appointed, not by the governor of the District or by the legislative assembly, but by the United States.

Second. Not only are the members of the board appointed by the United States, but they are also paid by it. They

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are, therefore, clearly officers of the United States, and not of the District. 17 U. S. Stats. at Large, p. 500.

Third. Thus appointed and paid, the board is vested, not by the legislative assembly of the District, but by Congress, with enumerated functions.

Fourth. And this is done in the most direct and absolute form. It is made its *duty* to perform these functions conferred on it. They cannot be evaded or innocently neglected.

Fifth. Among the powers thus conferred upon the board are these: 1st. To declare "what shall be deemed nuisances injurious to health." This requires it not only to determine or decide, but, in addition to this, to *proclaim*, to make an open and explicit avowal. 2d. This avowal or declaration must embrace the judgment or opinion of the board as to what, in the words of the law, "shall be deemed nuisances injurious to health." While they are thus confined to questions affecting health, the range of their duty in this respect clearly goes beyond "nuisances at common law," and makes them the public guardians of the health of the inhabitants of the District. 3d. And the board, and it alone, is authorized to decide what shall be regarded such nuisances, *i. e.*, nuisances affecting the health of the people of the District. The power conferred upon it in this respect is clearly discretionary, and its declaration is conclusive. It is what shall be *deemed* by the members of the board a nuisance affecting health, which is to be declared such.

Not only is it made the *duty* of the board to consider, to determine, and to declare what they may regard as nuisances injurious to health, but in addition to this it is to *provide* for the removal of such nuisances. It is not required to, *directly* and by its own action, remove them, but to *provide* for the removal; that is, to arrange beforehand, to adopt a plan or to establish regulations having in view the removal of an evil and adapted to the end.

It is then authorized to make and enforce regulations to prevent domestic animals from running at large, and in reference to the sale of unwholesome food.

And finally to perform such other duties as the legislative assembly may impose upon it.

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Such, while an imperfect, appears to be a fair and correct analysis of the law.

Now, in attempting to perform the duty imposed upon it as respects nuisances and their removal, it has passed an ordinance entitled "An ordinance to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof."

In passing this order, or, as it is termed, ordinance, has the board acted within the letter or intention of the act of Congress creating it?

First. The answer must be derived, in the first place, from the cited section of the act of Congress; and by reference to it and the analysis given of it, it clearly appears that the board possesses the power to determine what are nuisances, not simply nuisances at common law, but nuisances injurious to health. Therefore, as respects the determination of the board and its declaration, this part of the ordinance must be sustained.

Second. It is equally clear that the board is empowered to *provide* for the removal of what they may regard and declare to be nuisances injurious to health, so that the adoption or use of appropriate means for the preservation of health and the removal of nuisances is thus expressly authorized; and as the means are not prescribed, they are left to the choice of the board. Exercising this choice, the ordinance cited has been adopted, and proceedings in a competent court authorized. Was not this a wise choice? It is indisputably one in harmony with the practice of local authorities everywhere. Why, then, should its adoption be denounced or censured? What sound objection can there be to it? Is it not one within the very meaning of the term *provide*, as used in the act of Congress, viz, an appropriate means adopted for the arrest or removal of an evil?

Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed, one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. 1 Dillion on Municipal Corporations, p. 404.

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Power "to suppress bawdy houses," gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end. 1 Dillion on Municipal Corporations, p. 412.

Under power to "prevent and remove nuisances," a corporation may, if a vacant building is so used as to endanger by fire the property of others, or the health of the community, declare the same a nuisance, and notify the owners to abate it. *Nolin vs. Mayor*, 4 Yerg., (Tenn.,) 163, 1833; 1 Dillion on Municipal Corporations, p. 412, note 1.

Mr. Justice Walker, one of the most accomplished of early American judges, speaking of an ordinance prohibiting the making of soap or candles contrary to the mode prescribed, and within the limits of the city, says: I am willing to admit that the by-law itself is a valid one. If it restrained an inoffensive trade, it would not be so; but it is made to restrain one that is both offensive and dangerous. It is, therefore, calculated to guard the comfort and safety of the citizens; *and the benefit of a by-law is generally the touchstone of its validity*. In *Zylstra vs. Corporation of Charleston*, 1 Bay, (South Car.,) 382, 1794; 1 Dillion on Municipal Corporations, p. 406.

Board of health. An ordinance creating and giving to the board of health "*general supervision over the health of the city*," and "all necessary power to carry the ordinance into effect," was considered to include the power to rent a building for a temporary hospital, to protect the city from an apprehended visitation of the cholera, and to make the corporation liable for the rent, although it did not become necessary to use the house. *Aull vs. Lexington*, 18 Mo., 401, 1853; 1 Dillion on Municipal Corporations, p. 407.

As the police and sanitary powers were possessed by municipal corporations at common law, it is believed that, without any legislation conferring the authority, they could regulate by proper ordinance and by-laws the manner of carrying on any trade or business within the municipality, so far as to prevent monopolies; the sale of unfit commodities, and insure proper conduct of those who practice it; prevent slaughter-houses and the slaughtering of animals, tallow chandlers and the like, within the walls or certain limits of a city. Potter's

Dwarris on Statutes and Constitutions ; Wilcox on Municipal Corporations, p. 141.

Such are a few of the authorities which tend to establish that a municipal corporation, in the absence of express authority, possesses the power as an incident of its existence and character to pass by-laws or ordinances for the suppression of nuisances, by the imposition of fines or penalties; and also that general power to prevent and suppress nuisances carries with it the right to pass such ordinances. Indeed, this cannot well be disputed as respects municipal corporations proper, or as ordinarily constituted.

Now, what corporations proper, or as ordinarily constituted, may do in the absence of express legislation, or under a general authority as respects ordinances or regulations, may not *quasi* corporations do ? This is a question to be determined by reason and authorities ; both concur in furnishing an affirmation.

Municipal governments are mere creations of the law. They are exactly what the supreme authority see fit to make them ; and if that authority creates an anomalous or peculiar government it can do so. If it curtails the power ordinarily bestowed, or if it withholds any commonly granted, and confers the withheld powers on a distinctive body, it can do so. In either event the government is just what it is made by the law-maker ; and as made, in its aggregate or in its separate parts, its functions are complete ; but in one form no more than in the other.

This is peculiarly true of the government of this District, created by Congress under that part of the 8th section of the Constitution which confers on Congress exclusive legislation in all cases whatsoever. And when Congress has created a government of parts—1st, the legislative and executive ; 2d, the board of public works ; 3d, the board of health ; and 4th, the judiciary and courts—it should be so regarded, and the functions of each be construed accordingly.

With possible abuses or with considerations of propriety the court has nothing to do. Potter's Dwarris, 453.

It will thus be seen that these corporations, while they differ to some extent from those commonly called municipal, at the same time may constitute a division or part of a local

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government, and, to the extent to which they are charged with any duties, possess the power to render them efficient, or enforce them, as well as to maintain their privileges. Hence, within the range of their limited powers they may make orders, adopt regulations, or pass ordinances. And the controlling question becomes one as to the intention of the legislature—in this case of the intention of Congress.

The answer which may be promptly suggested is that it is *unusual* thus “to divide up governmental or legislative powers.” So it may be; but this is immaterial. If it is done, the division of power should be sustained, even if it compels the recognition of different bodies with full or *quasi* legislative powers.

Davidge and Williams for Frederick Bates.

Mr. Justice OLIN delivered the opinion of the court as follows:

The first question presented in the case is, what are the powers conferred on the board of health under the statute? The language of the act seems hardly susceptible of doubt or controversy, and its meaning perfectly obvious. It is this: “The board of health shall be empowered to declare what nuisances are injurious to health, and provide for the removal thereof.” But the interpretation placed upon this section by the board of health and insisted upon by its counsel, is, that the board of health is empowered to declare anything or any condition of things to be a nuisance which, in the exercise of its judgment and discretion, is deemed injurious or dangerous to health, and proceed to deal with it as such, although the thing or condition of things declared to be a nuisance was never, before the passage of this ordinance by the board, deemed, taken, or adjudged to be such by the rules of the common law, or in pursuance of any statute law relating thereto for governing this District. Such a construction of the statute would confer a most extraordinary legislative power and a very summary mode for its exercise. The power claimed by the board, I hesitate not to say, is not possessed by Congress or any legislative assembly in any

State of this Union, nor can it be conferred until the Constitution of the United States becomes a dead letter. I will attempt to show this; but, first, it may be proper to consider what is the consequence by the rules of the common law of making or maintaining a nuisance, and especially a nuisance injurious to health. Such a nuisance is an offense against the whole community where it exists, and every individual of this community has the right to remove it; that is, to abate it by force, if need be. A nuisance, by the rules of the common law, is nearly as well defined as is the offense of assault and battery. It is, says Blackstone, "annoyance, anything that worketh hurt, inconvenience, or damage." 3 Bl. Com., 215. A far better definition of a nuisance will be found in 9th Co., 58 n. d. c., William Aldred's case, and by Lord Mansfield, 1st Burr., 337, and it is this: "Anything that renders the enjoyment of life and property uncomfortable." I think this definition would be nearly perfect if you but add, Anything which naturally and necessarily tends to deprave and corrupt the morals of the community. By the rules of the common law, where such nuisance exists any member of the community has the right to abate it; that is, to take the law into his own hands and destroy or remove it.

But there are many things nuisances by the common law which are not injurious to health, and this fact alone seems to me to offer a key, as it were, to the interpretation of the section of the act of Congress here quoted. I need only in this connection refer to one or two cases. In Hall's case, (1st Mod., 76,) Hall, a rope-dancer, had erected a stage or was about erecting one at Charing Cross, and the Court of King's Bench pronounced it a nuisance and ordered its removal—abatement—and this upon the authority, as Lord Chief-Justice Holt states, of a case occurring in the reign of Charles I. Noy came into court and prayed a writ to remove a bowling-alley erected near St. Dunstan's Church, and had it (See 2 Keb., p. 8, 116.) Here a writ was granted to remove the bowling-alley without any presentment at all; and says a learned judge, (see 5 Hill, 124,) the tendency of the alley, being well known, it was adjudged to be a nuisance of itself, and a writ accordingly issued to remove it without any trial.

In the case of the *People vs. Sargant*, 8 Cowen, 129, the

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same court which decided that a bowling-alley kept for gain and hire was a nuisance, decided that a billiard-room kept for the same purpose was not. It is somewhat difficult, I confess, to discover the principle which makes the bowling-alley a nuisance in and of itself, and a billiard-room kept for the same purpose no nuisance at all. Perhaps the distinction in the two cases consists in the fact that knocking down pins with wooden balls disturbs the quiet of a neighborhood more than does the punching of a small ivory ball around a table covered with cloth. I mention these cases for two purposes: first, to show that there are nuisances by the common law which are not *injurious to health*, but, on the contrary, are eminently conducive to it, such as the exercise at the bowling-alley or the billiard-table for men of sedentary habits. The most learned of the profession, to whom is committed the care of our health, and often our lives, have recommended such exercise as most salutary. And second, to show what legal consequences follow the keeping or maintaining of a nuisance. It will be observed, it is stated that "Noy came into the court of King's Bench and prayed for a writ to remove a bowling-alley erected under the eaves of Saint Dunstan's Church," and the writ *was granted without any presentment or trial*. This would seem a pretty summary proceeding, which in effect destroyed a man's property, and condemned him without trial or hearing, and yet the decision was in strict conformity to law, if it be conceded that a bowling-alley is *per se* a nuisance. The Court of King's Bench assumed no more power in issuing a writ to remove it than might have been exercised by the whole congregation of Saint Dunstan's Church, though when done under the authority of a judicial writ, executed by the sheriff, it would probably be done in a more quiet and orderly manner than by a mob composed of the congregation and the neighbors.

Cowen, J., says that the decision in Hall's case is not because rope-dancing, or playing at nine-pins, or any other game with bowls is a mischief, nor that being a spectator at a rope-dance is censurable in the least. In themselves they are innocent. This nuisance consists in the common and gainful establishment for the purpose of sports, and having an aptitude and tendency, as Hawkins says, (1 Hawkins, p.

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6, by Curwood, Ch. 32, p. 6,) to induce idleness, and draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood. If the decision in Hall's case had been placed upon the ground, not that a bowling-alley was a nuisance *per se*, but that erecting a bowling-alley beside a church, which had been a place of worship for a much longer period than Bates's soap and candle factory has existed, which is said to be only some forty years, it would to my mind be much more satisfactory. Many things perfectly innocent, in and of themselves, may become a nuisance by reason of surrounding circumstances. Thus a bowling-alley erected so near a church as, when employed, to interfere with the decent solemnity of worship is a nuisance; and so while music at the proper time and place is a delightful enjoyment, yet if the Marine Band should appear daily before the City-Hall during the sessions of this court, and discourse music ever so well, I think this court could treat the band as a nuisance and remove it in a summary way.

It will thus be seen that a nuisance, by the rules of the common law, is a kind of *caput lupinum*, which any and every body is authorized to knock in the head; that is, destroy-abate. So if the passage of the section I have before quoted, made the boiling of fat, tallow, grease, or swill, except for cooking purposes, a nuisance, anybody and everybody may lawfully put an end to it by force, if necessary. This ordinance then, if enforced, would in effect work a confiscation of all Bates's property employed in the manufacture of soap and candles; for it is absurd to say you do not confiscate a man's property when you prohibit the use of it for the purposes it was designed for, and in the only way in which it can be made valuable. It is, in substance, the same as to enact that whoever owns a horse may keep it, take good care of it, but shall not sell it, or use it any way in which horses have heretofore been used or can be profitably used. It is quite possible that all the heating-apparatus, kettles, tubs, and other contrivances used in the manufacture of soap and candles may be used in some other branch of industry, and thus not be wholly destroyed. We are not advised how that may be; perhaps his kettles or caldrons could be employed in "boiling swill;" but, alas! that branch of industry

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is prohibited by this ordinance, "except for cooking purposes." As man is the only animal who has hitherto contrived to cook his food, this ordinance graciously exempts from its penalties all who desire to *boil scill* for cooking purposes. It is devoutly to be hoped that the beneficiaries under this exception are not very numerous in this District. I have thus far attempted to show that the power conferred on the board of health did not authorize it to declare a thing, or any condition of things, to be a nuisance, which in their judgment or discretion was injurious to health, which thing or condition of things was no nuisance by the rules of the common law, or any statute law in force in this District; but simply the power to declare *what nuisances were injurious to health*. In other words, it was not a power to make a thing a nuisance which was no nuisance at all prior to the passage of this ordinance. It is said to be "an ill wind that blows nobody any good," and the prohibition to manufacture candles may promote the interest of the gas-companies of the District, and when a monopoly of the business of lighting our houses is given to these companies, the quality of the gas, doubtless, will be somewhat improved, and the price considerably reduced. All monopolies are, by some modern political economists, said to have that tendency. If cleanliness be the next thing to godliness, the good people of this District should all desire an abundant supply of soap and Potomac water. No one who passes daily the streets and avenues of this city but will have occasion to regret the sparing use of both. The manufacture of soap and candles has hitherto, in the world's history, been taken and deemed to be an honest and useful branch of business, and one to be promoted and encouraged; but if it be in and of itself a nuisance "injurious to health," it ought to be stopped, because life and health are dearer rights than the right of property, and when the latter interferes with the higher rights of life and health, it must give way. *If the manufacture of soap and candles is a nuisance, it is equally so anywhere else as well as on G street.* If it be injurious to the health of the neighborhood, it must be still more dangerous to the health of those engaged in the business, and why not, therefore, prohibit the manufacture of soap and candles everywhere? Upon what theory is it

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declared to be a nuisance injurious to health within the limits of the cities of Washington and Georgetown, and outside of those limits, impliedly, no nuisance at all? Are the good people of this District outside of the limits of those cities not to be protected against nuisances injurious to health? The board of health is appointed for the District, and not solely for the cities of Washington and Georgetown. It will probably be replied to this, that a soap-and-candle factory, carried on in the neighborhood of dwelling-houses and in a portion of the city considerably built up, may properly be deemed a nuisance, and Bates be reasonably required to remove this factory to some unsettled and unoccupied portion of the District, if he can find such a place.

The facts in this case show that for almost half a century (over forty-six years) Bates and his ancestors have prosecuted continuously the business of manufacturing soap and candles at this same place. At the time when, and the place where, this factory was established, it could not, we know historically at least, have been a nuisance, except to those employed in it and the frogs and owls of that neighborhood, which chiefly, if not solely, *then* composed the population of that vicinity. In the progress of improvement and increase of population in the vicinity of this factory, the lands were purchased and dwelling-houses built upon them, and such other buildings as were necessary and convenient for the ordinary business of men, at much less rate per foot, doubtless, than could have been purchased on La Fayette or Franklin Squares. All the purchasers of these lots knew, or ought to have known, that Bates's soap-and-candle factory was there, and they were under no legal or moral constraint to purchase a lot and build a dwelling-house by the side of it. It would be quite as legal, and certainly more equitable, for the board of health "to enact and ordain that persons who have built dwelling-houses so near to Bates's factory as to render their occupation 'injurious to health' must instantly remove therefrom, under a penalty of not less than two nor more than twenty dollars per day." I have before stated that the power assumed by the board could not be conferred on it, for the reason that it would practically effect a confiscation of Bates's property "*without due process of law.*" How far the proceedings

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against Bates conform to *due process of law* it would seem idle to inquire; yet it may be pertinent, in this connection, to repeat what has been said by learned judges as to the meaning of this phrase, *due process of law*. To do that, I quote at some length from Comstock, J., in the case of *The People vs. Wyenhamer*, reported in the 3d of Kernan, 378, as expressing more clearly and forcibly my views of the law than I can hope to do by any language of my own.

Speaking of the limitations of legislative power under our form of government, and particularly of that provision in the fifth amendment of the Federal Constitution, he says:

"These provisions have been incorporated, in substance, into all of our State constitutions. They are simple and comprehensive in themselves; and I do not perceive that they derive any additional force or meaning by tracing their origin to *Magna Charta*, and the later fundamental statutes of Great Britain. In *Magna Charta*, they were wrested from the King as restraints upon the power of the Crown. With us, they are imposed by the people as restraints upon the power of the legislature. No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that the 'law of the land' or 'due process of law' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property leads to a simple absurdity.

The Constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong, and this would be throwing restraint entirely away. The true interpretation of these constitutional phrases is, *that where rights are secured by the existing law, there is no power in any branch of the Government to take them away*; but where they are held contrary to the existing law, or a forfeiture by its violation, then they may be taken from him, not by an act of the legislature, but in the due administration of law before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or at least it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer, nor will

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it make any difference although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land' and 'due process of law' within the meaning of the Constitution, then the legislature is omnipotent."

"Clear as this matter stands upon principle," says Comstock, J., "it is equally well settled by authority."

"Chief-Justice Gibson, of Pennsylvania, speaking of a similar clause in the constitution of that State, and the right of property protected by it, said, 'What law? Undoubtedly a pre-existing rule of conduct, not an *ex-post-facto* rescript made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the Government, and there would be no exclusion of it if such rescripts or decrees were to take in effect the *form of a statute*. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, the liberty of the citizen will be no more.' *Norman vs. Heirst*, 5 Watts and Serg., 193. And Chief-Justice Bronson, of this State, in the case of *Taylor vs. Porter*, 4 Hill, 175, said: 'The words *law of the land*, as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense.'

So to the same effect the opinion of C. J. Ruffin, of North Carolina. In the case of *Hoke vs. Henderson*, 4 Dev., 15. Chancellor Kent, 2 Com., 13, says: "The words *law of the land*, as used originally in *Magna Charta* in reference to this subject, are understood to mean due process of law; that is, by indictment or presentment of good and lawful men; and this, said Lord Coke, is the true sense and exposition of those words." The better and larger definition of due process of law, says Kent, "is that it means law in its *regular course of administration through courts of justice*." See Story on Const., 661; 10 Yerger, 59; 2 Coke's Inst., 45, 50.

The views thus expressed by Comstock, from whom I have just quoted at some length, were concurred in by such eminent judges as Johnson, Selden, and Davis.

Since the foregoing was written, my attention has been called to the case of *Bartemyer vs. The State of Iowa*, decided by the Supreme Court of the United States, reported in the

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April number of the American Law Register, 1874, vol. 13, No. 4. On a careful perusal of the case, I do not see that its decision conflicts with any principle I have attempted to maintain as applicable to this case.

I will not attempt to define the limits or extent of what is termed the police power of the State. This power is very ill-defined by courts, and is perhaps undefinable. The best attempt at it I have seen will be found in the opinion of Justice Field in the case last before referred to, in which he says: "I have no doubt of the power of the State to regulate the sale of intoxicating liquors, when such regulation does not amount to the destruction of property in them, the right of property in an article, the person to sell and dispose of any such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it or dispose of it, nor use or enjoy it, *confiscates it, depriving him of his property without due process of law.*"

I will only add, that where the right to regulate the use of property is so exercised as necessarily to effect a confiscation of the property, it overthrows all constitutional limitations of legislative power. All power, when conferred, whether executive, legislative, or judicial, is impatient of restraint or limitation, and it was well observed on the argument of this case that, as a general rule, the less the power conferred the more was assumed.

But it is argued, in the second place, that although this ordinance be void and inoperative, yet Bates has mistaken his remedy ; and for that cause the writ of certiorari should be dismissed. It is claimed that whenever an appeal is given from the decision of a subordinate tribunal to a superior, the common-law writ of certiorari will not lie, and numerous cases are cited which are supposed to establish this position. These cases, when examined, will not, I think, be found such authority as is claimed for them. 1st, the office of the common-law writ of certiorari has always been the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded, or is proceeding, to judgment without jurisdiction of the subject-matter or of the person or the property proceeded against ; whereas the office of an appeal is to give to a party believing himself aggrieved a retrial of

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his cause before another tribunal. Suppose the police court entertain a suit for a divorce and is proceeding to judgment, would an appeal from its judgment be the appropriate remedy? Upon appeal, there would be no retrial of the case; neither the police court nor the appellate court (criminal) having any jurisdiction whatever of the subject-matter. Still worse, suppose the police court proceeds to judgment, or is in progress of doing so, against a person charged with some criminal offense, who has never been arrested, or in any way served with the legal process notifying him of the proceeding against him; in other words, no jurisdiction of his person having been obtained, the court, however, proceeds to judgment, and imposes a fine, or fine and imprisonment. Is his only remedy by appeal? By bringing an appeal in such case, which is simply asking a retrial, he appears in court, subjects himself to its jurisdiction, and thus obviates the very objection against the proceedings in the police court of which he complains. The appellate court then, by the appeal having jurisdiction of his person, I do not see why it may not proceed to try the cause upon its merits. The writ of certiorari has frequently been adjudged the appropriate remedy when an inferior court having jurisdiction of the subject-matter and of the person yet proceeds irregularly or contrary to the prescribed rules of law. In such case, if no appeal be given, the only appropriate remedy is by the common-law writ of certiorari. These distinctions I have pointed out will, I think, reconcile all the adjudicated cases referred to in the briefs cited to show that when an appeal is given from the judgment of a court of inferior jurisdiction, the writ of certiorari will not lie. Looking through the ordinance enacted by the board of health it seems to me to be a wholly mistaken view of the powers conferred upon it, and to exemplify the wisdom of the maxim *ne sutor ultra crepidam*, which, liberally interpreted, may mean "Doctor, stick to your lancet and bolus." Few men learned in the law, and still fewer legislative assemblies, have had the wisdom to enact a code of municipal law which has had more than a butterfly-life, and it is by no means extraordinary that this code of municipal law, for such it is so far as it goes, should turn out a failure.

This simple and wise provision authorizing, as I have

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attempted to show, the board to declare what nuisances are injurious to health, and directing them to provide for the removal thereof, is construed to mean a power to declare anything a nuisance which in their judgment is injurious to health; and having thus been made a nuisance, may be dealt with as such, under the power given for the removal of such nuisances as are injurious to health, with one or two solitary exceptions. The power to remove is attempted to be exercised by imposing a penalty of greater or less amount. This, it seems to me, is no provision for the removal of a nuisance, especially of one injurious to health.

We were informed on the argument of this case that the board of health, before enacting this ordinance in question, procured the opinion of counsel learned in the law as to the true meaning of the section of the statute before quoted, and as to what power was by it conferred upon the board; and, further, that an application was made to the Department of Justice as to the true construction of the act of Congress in question, and that, in both cases, the board was advised that the act gave the power to do what the board has done in enacting the ordinance in question. This court, I trust, will always listen with distinguished consideration to the opinions of men learned in the law, even when well paid for giving their client such an opinion as desired. The opinion from the Department of Justice is a little remarkable in several respects. In the first place, it says if the punctuation of the statute were altered and one word added thereto, the statute would confer the power attempted to be exercised by the board. In reference to this matter, I have only to say I do not perceive what the Department of Justice has to do with construing an act of Congress applicable to this District. Judges are appointed mainly for the purpose of deciding what the law is, but if such a barnacle as the Department of Justice can be attached to the administration of the law to construe statutes, judges would seem to be useless, expensive, and unnecessary.

Secondly, I observe it is not the business of judges to alter the punctuation of statutes, much less to add words to or subtract words from it, if, upon considering it as written

and punctuated, they can perceive with reasonable certainty what the statute means.

But doubtless we are favored with the opinion of counsel and also that of the Department of Justice as evidence that the board of health was actuated by an honest desire to learn the extent of the power conferred on it, and to discharge its whole duty. That needed no evidence. This whole community, I think, recognize the great services this board have rendered it for the few past years. Beyond doubt hundreds of the people of this District are to-day alive by reason of the faithful, intelligent, and well-directed efforts of this board of health ; and it is refreshing in these days to see men of learning and skill devote themselves assiduously to the important duties imposed upon them, for a salary so contemptibly meager. But for the reasons I have assigned, I think the motion to set aside the writ of certiorari should be denied, and that a judgment in favor of Bates, dismissing the proceedings in the suit commenced before Justice Snell, should be entered.

Mr. Justice WYLIE concurred in the judgment, but expressed the opinion that the right to maintain a nuisance could not be acquired by long use, and that when a nuisance was really injurious to the health of persons occupying neighboring dwellings, it could be abated by legal process, although such nuisance had been in the same place before settlement and population extended to that part of the city ; but that where property was involved in the abatement of a nuisance the proceeding must be by indictment and trial by jury.

Mr. Justice MACARTHUR dissented, and the chief-justice did not sit in the case.

JOSEPH B. STEWART vs. JAMES G. BLAINE.

AT LAW.—No. 10610.

The House of Representatives has power to commit for contempt, and when a party is found guilty of a contempt the order of the House directing his commitment is a complete protection to the Speaker who orders him into custody of the Sergeant-at-Arms.

STATEMENT OF THE CASE.

This is an action of trespass for assault and false imprisonment. The declaration contains four counts, the first of which alleges that the defendant on the 29th of January, 1873, in the District of Columbia, caused the plaintiff to be assaulted and seized, and forced and compelled to go to a room in the Capitol building, and to be there imprisoned, &c.; and the same allegations are in substance repeated in each of the remaining counts.

To this declaration the defendant pleads the general issue, and also pleads in justification that during all the time mentioned in the declaration a session of Congress was holden in said District, and the defendant was a member of the House of Representatives and the Speaker thereof; that at the said session, and before the said time, a committee of the House was duly appointed under a resolution thereby adopted, and was instructed to inquire into and report to the House upon certain matters of great importance to the United States, and was also given authority to send for persons and papers; that the plaintiff was afterward called and sworn as a witness before said committee to testify concerning the matters aforesaid, and upon being asked by the committee certain questions of and respecting the same matters, did wholly decline and refuse to answer them; and that the said committee then submitted to the House a report setting forth, among other things, the refusal of the plaintiff to answer the said questions, and charging him with a contempt of the House.

That thereupon it was ordered by the House that the

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Speaker issue his warrant, directed to the Sergeant-at-Arms, commanding the latter to take the plaintiff into custody and bring him to the bar of the House to show cause why he should not be punished for a contempt, and in the mean time to keep him in custody to await the further direction of the House.

That in pursuance of said order the defendant, being such Speaker, issued his warrant directed to the Sergeant-at-Arms, whereby, after reciting the said order, the latter was commanded to execute the order therein recited, and the said warrant was delivered by the defendant to the Sergeant-at-Arms to be executed in due form of law; and that by virtue and in execution of said warrant, the Sergeant-at-Arms afterward arrested the plaintiff and took him in custody, and, as soon as he conveniently could do so, brought him before the bar of the House.

That thereupon (the plaintiff first being heard by the House concerning the premises) it was in and by the House resolved that the plaintiff had failed to show sufficient cause why he should not answer the said questions, and that he be "considered in contempt of the House for failure to make answer thereto;" and it was furthermore in and by the House resolved as follows, to wit: "That, in purging himself of the contempt for which the plaintiff was then in custody, he should be required to state to the House forthwith, or as soon as the House should be ready to hear him, whether he was then willing to appear before the said committee to whom he had thitherto declined to make answers, and make answer to the questions for the refusal to answer which he had been ordered into custody; that if he answer that he is ready to appear before the said committee and make answer, then he should have the privilege to so appear and answer forthwith, or so soon as the committee could be convened, and that in the mean time he remain in custody; that in the event that he should answer that he is not ready so to appear before said committee and make answer to the said questions so refused to be answered, then that he be recommitted to the said custody for continuance of such contempt, and that such custody should continue until he should communicate to the House, through the Speaker, that he is ready to appear

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before the said committee and make such answers, and until further order of the House in the premises ;” whereupon the defendant, in the discharge of his duty as Speaker under the last-mentioned resolution of the House, and while the plaintiff was still before the bar of the House, asked the latter whether he was then willing to appear before the said committee and answer the questions for the refusal to answer which he had been ordered into custody ; and that the plaintiff declared that he was not then willing or ready to appear before the said committee and answer the said questions.

That in pursuance and for the execution of the said last-mentioned resolution of the House, and in discharge of his duty thereunder as Speaker, the defendant did then and there recommit the plaintiff to the custody of the Sergeant-at-Arms, by whom he was thenceforth kept in custody until discharged therefrom by order of the House.

The third plea contains the same allegations substantially as the second, being pleaded in bar of all the counts of the declaration.

1. The plaintiff joined issue on defendant’s first plea.

2. The plaintiff demurs to the defendant’s second and third pleas, and says the same are bad in substance.

3. One of the matters of law intended to be argued on each of said pleas is, that neither of them does set forth specifically, nor in substance, the questions which said pleas allege that the plaintiff declined to answer, and for which the plaintiff is alleged to have been in contempt of the authority of the House of Representatives of the Congress of the United States.

The court orders the demurrers in this case to be heard at the general term in the first instance.

Paschal and *Moore*, for the plaintiff, claimed in support of the demurrer that the questions asked (which, although not set forth in the pleas, appear in the fourth count of the declaration) referred to privileged communications made to the plaintiff by his client, while the relation of lawyer and client existed, and that he was not in contempt for refusing to answer the same. That the House of Representatives had no

authority under the Constitution to prosecute the inquiry upon which their committee was engaged when the said questions were asked. 1 Shar's Blackstone, 163, note 34; Texas, 668; 1 Abbott Ct. Ct., 43; 3 Macaulay's His., 309.

G. H. Williams, Attorney General, and A. J. Bentley, for defendant, made the following points :

1. The House of Representatives has power to commit for contempt.

This proposition, though at one time a subject of grave discussion, will hardly be controverted now; the question as to the power of the House to commit for a contempt having been judicially determined by the Supreme Court of the United States, in a case involving that very point, which was carried up from the old circuit court of the District of Columbia. *Anderson vs. Dunn*, 6 Wheat., 204; 1 Kent, Com., 7th ed., p. 250, note A; Story on Const., 4th ed., sections 846, 849; *Ex parte Nugent*, 1 Am. Law Jour., (N. S.,) p. 107; Rawle on the Const., pp. 47, 48; Sergeant's Const. Law, p. 354, Act of January 24, 1857, sec. 1, 11 Stat., 155; *Wickelhousen vs. Willet*, 10 Ab. Pr. Rep., 164.

2. As incident to the power referred to above, the House has also the power, *on a charge of contempt*, to cause the person charged to be taken into custody, and to be brought to the bar thereof to answer the charge; and it alone is the proper judge when this power is to be exercised. *Gosset vs. Howard*, 10 Q. B., 452.

3. The House has the exclusive right to determine whether a party brought before it on a charge of contempt is guilty of the charge; and its decision is final, and cannot be questioned elsewhere. *Anderson vs. Dunn, supra*; *Stockdale vs. Hansard*, 9 Adolphus & Ellis, 169; 3 Privy Council, 572; 7 Wis., 641; 24 N. Y., 74; Brass Crosby case, 3 Wils., 199; *Beaumont vs. Barrett*, 1 Moore's P. C. Cases, 80; *Ex parte Kearney*, 7 Wheaton, 38; Sheriff of Middlesex, 11 Adolphus & Ellis, 273; *Burdett vs. Abbott*, 14 East., 1 and S. C., 5 Dow., 185, 188.

4. The House having by resolution adjudged the plaintiff guilty of a contempt, the order of commitment for such con-

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tempt, made by the House, is a complete protection to the defendant for his acts done in the due execution thereof. *Burdett vs. Abbott, supra.*

The defendant, as is admitted by the pleadings, in discharge of his duty as Speaker under that order, and while the plaintiff was still at the bar of the house, asked the latter whether he was then willing to appear before the committee and answer. This the plaintiff declared he was not willing to do, and thereupon the defendant, in execution of said order, and in discharge of his duty as Speaker thereunder, committed the plaintiff to the custody of the Sergeant-at-Arms, by whom he was thenceforth kept and detained until discharged from custody by a further order of the House.

The resolution of the House that the plaintiff was guilty of a contempt, and the order of the House directing his commitment therefor, were in conformity to the power of that body; and it does not appear that, in executing such order, the defendant did anything more than it was his duty to do. Would it not be monstrous, then, to hold him liable to an action for merely obeying an order of the House, made in the exercise of a power unquestionably belonging thereto?

CARTTER, C. J., delivered the opinion of the court:

The whole subject of controversy in this case, as presented to the court, is resolved in the question, Had the House of Representatives of the United States jurisdiction in the premises?

If jurisdiction over the subject and person of the plaintiff resided in the House, the ministerial functions discharged by the Speaker and Sergeant-at-Arms in the premises were justified in the jurisdiction. Under the principles of law regulating the relations of ministerial officers to those around them, and affected by their acts, two questions are fundamentally important. Has the authority issuing process jurisdiction of the subject, and of the person against whom process goes? These two questions answered affirmatively, nothing remains in the determination of the question as to their right to execute the process. Their liability, thenceforward, is regulated by the responsibility as to the *manner*

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in which they do it, a subject not made matter of complaint in this case.

The question of power to punish for a contempt in the case now before the court was settled by the Supreme Court of the United States in the case of *Anderson vs. Dunn*, 6 Wheaton, 204, more than half a century ago, after a stout contest, and upon thorough deliberation. This authority has been uniformly acquiesced in for over fifty years, and until reversed must be regarded as conclusive with this court. If authority, the subject of this controversy is *stare decisis*.

In making this decision, the court confines itself strictly to the adjudication of the case made. We are not engaged in the investigation of the rights of a citizen held in durance vile under an application by writ of *habeas corpus*.

The demurrer to the pleas is overruled.

The case of *Stewart vs. Ordway* involves the same questions, and comes before the court in the same manner, being an action against the Sergeant-at-Arms for the same alleged trespasses. There will be the same judgment as in the case just decided.

SMITH ET AL. VS. WOODRUFF.

Where two patents have been granted for articles which resemble each other, a presumption arises from the action of the Office that there is such a difference between them that the use of one constitutes no infringement of the patent for the other.

If one paper-file holds the paper better than another which is patented, and has driven it out of market, that is *prima-facie* evidence that the mechanism is different, and is a new invention, and that the use of it does not violate the patentee's monopoly.

A patented combination may be used without infringing the patent, if one of the elements of the combination is omitted, although another is substituted in its place which is new, or performs a substantially different function, or if it was not known as a proper substitute when the patent issued.

W. E. Edmonston attorney for plaintiff.

R. D. Mussey attorney for defendant.

Mr. Justice HUMPHREYS delivered the opinion of the court :

The court at the special term dismissed the bill, from which decree complainants appealed.

The Patent-Office had granted a patent to both parties for new and useful improvements in "paper-files," determining that each application had a patentable quality, and that there was no interference.

Complainants afterward filed the bill in this case, alleging an infringement, and asking an injunction. The court at the special term came to the conclusion that there was no infringement, and as a written opinion by Justice Humphreys was then filed, we content ourselves now by an affirmance of the decree at special term, substantially for the reasons stated in that opinion. It was expressed in the following language :

In this case the complainant files a bill against the defendant, alleging therein an infringement by the defendant of the

complainant's rights under a certain patent, and asking for an injunction. It alleges that letters-patent were issued to the complainant for a certain invention for filing and holding papers; and that the defendant has infringed upon the rights of complainant under said patent, by making and selling a like machine. All which allegations are denied by the defendant.

The evidence shows that the application of the complainant for a patent was filed January 6, 1868; and that the defendant filed an application for letters-patent for his machine January 7, 1868. That a patent was issued to defendant on the 31st March, 1868, and subsequently, on the 14th of April, 1868, a further patent was issued for further improvements; and that on that day the complainant's patent was issued, and that complainant's patent was afterward surrendered, and a re-issue of the same made on the 9th day of April, 1872, for alleged infringement of which this suit is brought. But it is not claimed that these dates make any difference now as to the question in controversy.

The Patent-Office decided that there was no infringement, or conflict, between the two claims, and, so deciding, issued a patent to each party. It is here claimed by the complainant that that decision is erroneous; and the question now is whether the defendant's patent is an infringement upon the complainant's rights under his patent. The patent itself is made by law *prima-facie* evidence that everything that was necessary to have been done in the Office before the same could issue has been done; and that principle is carried even further than I at first thought a *prima-facie* case would go. But it is in the language of a reported case that I prefer to state this principle rather than in my own words.

In *Potter & Wheeler vs. Holland* (1 Fisher's Patent Cases) this principle is clearly stated. I have looked at the text, and it fully authorizes the head-note, which is short and which I will read:

"The patent is *prima-facie* evidence that the several grants of right contained in it are valid; that the several things, methods, and devices contained in it are new; that they were useful; that they required invention; and that they were the invention of the patentee. And this *prima-facie*

evidence must have full effect unless it is rebutted by sufficient countervailing evidence."

Now, that is the extent to which the *prima-facie* evidence of the patent goes—it purports to be issued after everything required to be done has been done. Now, here are *two patents*, and the question more particularly involved is whether or not the Patent-Office decided correctly in deciding that there was no conflict between the two machines. The one *patent* is of as much force as the other; and the main question at present is whether the decision of the Patent-Office, that there was no conflict between the two, is correct. I have come to the conclusion that the Office decided correctly.

In the case of *Gould vs. Rees* (15 Wallace, 187) the court says :

"Patentable inventions may consist entirely in a new combination of old ingredients whereby a new and useful result is obtained; and in such cases the description of the invention is sufficient if the ingredients are named, the mode of operation given, and the new and useful result is pointed out, so that those skilled in the art and the public may know the nature and extent of the claim, and what the parts are which co-operate to produce the described new and useful result.

"Damages are claimed by the plaintiff for the alleged infringement of certain letters-patent, and he instituted for that purpose an action of trespass on the case against the defendant to recover compensation for the alleged injury."

Here in this case the bill is filed seeking an injunction against the defendant for the alleged infringement. The court there further says that—

"Where the defendant, in constructing his machine, omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new, or which performs a substantially different function, or if it is old but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe."

Now, it is held that the principle in the two paper-files here

is the same; but the *principle* is not what was patented, but the *mode of operation and construction* of the machines. The defendant's machine holds the papers more securely than the complainant's, and it is decided in *Singer vs. Walmsley* (1 Fisher's Patent Cases, p. 558) that—

“If the result of the mechanism used by the defendants is greatly superior to that described and claimed by the patentee, this fact may be considered by a jury as tending to prove that the mechanism of the defendant is a new invention substantially different from that described by plaintiff.”

It is in evidence fully in this case that the defendant's machine has supplanted entirely that of the complainants, and the court is greatly relieved, and will be so all the way up to the court of last resort, by the presumptions in favor of the finding by the Office, to which is intrusted the determination of the question of patents and of conflicting claims therefor. I am not disposed to interfere with that finding; and if there is no infringement there could be no interference.

The decree will be that this cause coming on to be heard, being argued by counsel, and on due consideration, it is ordered, adjudged, and decreed that the complainant's bill be dismissed.

WILLIAM H. COTTON AND CHRISTOPHER JARRETT vs. CHARLES H. HOLDEN ET AL.

IN EQUITY.—No. 3135.

- I. By the seventh section of an act with regard to mechanics' liens upon buildings, it is provided "That the liens created in pursuance of the provisions of this act shall have precedence over all other liens or incumbrances which have attached upon the premises subsequent to the time at which said notice was given." Held, that the mechanic's lien begins only from the time of filing his notice, and a purchaser at any time before the giving of such notice takes title unaffected thereby.
- II. The fact that the mechanic is openly doing his work is not notice to any one, for it is not made so by the statute.

STATEMENT OF THE CASE.

The bill is filed to enforce a mechanic's lien. The plaintiffs contracted with the defendant Holden on the 1st of October, 1871, to put up the walls of the building, and to furnish the necessary brick and labor at certain prices which were agreed upon. The plaintiffs under this arrangement performed their contract until their claim amounted to \$1,226, upon which there is a balance due of \$876.68. A notice of lien was filed March 28, 1872. The defendant Holden, who employed the plaintiffs, was not the owner of the ground, but he had an understanding with George W. Linville and John Duncanson, who were the owners, to purchase it, which, however, was never carried out; and on the 27th day of February, 1872, they conveyed the property to defendant Pike, who executed a trust deed thereon to secure an indebtedness to the Freedman's Savings and Trust Company, and then conveyed to other parties not served with process in this case.

It will be observed that the notice of plaintiffs' lien was not filed until a month after the conveyance to Pike, and the principal point in the case is whether the mechanics' lien is entitled to priority over a purchaser intermediate the commencement of the work and the filing of such lien.

H. G. Milans for plaintiff.

S. R. Bonl contra.

Mr. Justice WYLIE delivered the opinion of the court:

This suit was brought to enforce a mechanic's lien claimed by the complainants, under the act of February 2, 1859, (11 Stat. at L., p. 376.)

The controversy turns upon the question whether, according to the provisions of our law, the contractor who files his notice of intention to claim a lien within three months after the completion of the work, obtains thereby, through the principle of relation, a lien from the time when he commenced the building, as against an intermediate purchaser. The determination of this question depends entirely upon the language of our own statute, which is unlike that of any of the States.

By the first section of our act it is provided that the contractor "*shall, upon filing the notice* prescribed in section second of this act, have a lien," &c. The lien is not to take effect except upon filing the notice; that is, as we understand it, the lien is to commence and take effect only from and after the filing of such notice.

By section second it is declared, "that any person wishing to avail himself of this act, whether his claim be due or not, shall file in the office of the clerk of the circuit court for the District of Columbia, at any time after the commencement of the said building, and within three months after the completion of such building or repairs, a notice of his intention to hold a lien upon the property declared by this act liable to such lien, for the amount due or to become due to him, specifically setting forth the amount claimed. Upon his failure to do so the lien shall be lost."

And by the seventh section it is provided, "that the liens created in pursuance of the provisions of this act shall have precedence over all other liens or incumbrances which have attached upon the premises subsequent to the time at which said notice was given."

It seems clear, therefore, that under our law the contractor may file his notice of intention to claim a lien at any time after the commencement, and within three months after the

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completion, of the work under his control; but that his lien begins only from the time of filing his notice.

The fact that he is openly doing the work is not notice to any one; for it is not made so by the statute.

This view of the law disposes of the present case; and the decree at the special term, dismissing the bill, is affirmed.

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DISTRICT OF COLUMBIA vs. THOMAS HERLIHY.

CRIMINAL DOCKET.—No. 9931.

- I. An information in a criminal case charged the defendant with keeping a tippling-house "at house No. 1601 Q street," in the city of Washington, and, on the trial of the cause before a jury, it was proven by the witnesses for the prosecution that defendant committed the offense at No. 1601 Twelfth street. The attorney for the District then asked permission of the court to amend the information by striking out the house, number, and street laid in such information, which was allowed, the defendant excepting. Held, that such amendment could not be made at the trial of the cause.
- II. Where a criminal information is required by statute to be under oath, it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant.
- III. The act of assembly providing that technical or clerical errors may be amended at the trial, extends only to formal or ministerial mistakes.

The case is stated in the opinion of the court.

William Birney and *Arthur A. Birney*, for the District, made the points following :

The amendment was properly allowed, because—

1. The substantial offense charged was that the defendant unlawfully engaged in business within the District of Columbia, and the fact that this was done at a particular house on a particular street formed no part of the offense, and consequently was immaterial and unnecessary to be strictly proved.

In all cases, except where the locality of the act complained of makes it an offense, it is sufficient to allege its commission in any county or district within the jurisdiction of the court. Bishop Stat. Cr., sec. 902, 95, 237 ; 1 Wharton Am. Cr. L., sec. 623, 2 ed., pp. 114-116 ; 2 Hawkins P. C., title Appeals, sec. 91-92 ; and 2 *ibid.*, title Indictment, sec. 83, 84 ; Stephen on Pleading, pp. 365, 316, 268 ; 1 Starkie Ev., pp. 372, 378, 380 ; 1 Greenleaf Ev., sec. 63-65 ; 1 Chitty Pleading, 395 ; 3 B. & C., 122 ; 3 Burr, 1586.

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A mistake in the particular place in which an offense is laid will not be material, if the evidence shows its commission within the jurisdiction of the court. Roscoe Cr. Ev., 1st Am. ed., pp. 102, 93; Pye's case, East's P. C., 785; 1 Chitty Cr. Law, 293, 200, 224.

The foregoing authorities fully support the position taken that the amendment was unnecessary, but as it could work no injury to the defendant, it was not error of which he can complain that it was allowed.

If the court should hold it necessary to prove the house laid, although it need not have been mentioned, the case is still within the purview of the act of the legislative assembly of the District of Columbia, approved June 25, 1873, which gives the right of amendment at the time of trial. Acts Leg. Ass., sess. 1, Ch. 23, 1873.

M. Howard Norris and *John D. Ellis*, for defendant, relied upon the points following:

The court erred in allowing said amendment, for the following reasons:

1. The allegation was matter of substance and a material averment, and should have been proved as alleged.

When the offense is in its nature local, the place must be proved as laid, although it need not have been stated. 1st Phil. Ev., p. 890, n. 249; Roscoe C. Ev., 112; *Comm. Mass. vs. Wellington*, 7 Allen, 299; *Peop. vs. Slater*, 5th Hill, 401, (New York;) *Comm. vs. Bacon*, 108 Mass., 26; *Comm. Mass. vs. McCaughey*, 9 Gray, 296; *Comm. Mass. vs. Reily*, 9 Gray, 1.

Informations differ in nothing from indictments in form and substance except that they are filed at the mere discretion of the proper law-officer. Arch. C. P. P., page 63-2, n. 1, (6th ed. ;) Whar. Amer. C. L., sec. 213. They must contain all the substantial requisites of an indictment at common law. *State of Ind. vs. Miles*, 4 Ind., 577; 8 Ind., 182.

3. There being no statutory provisions existing in the District of Columbia in regard to amending criminal informations, they are governed by the rules of common law, which allowed it to be done only before trial. Arch. C. P. P., p. 100; 1st Chit. Crim. Law, pp. 298, 842. Where amend-

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ments are allowed in the States, statutes exist authorizing them.

4. Informations are regulated by the same rules as indictments with respect to amendments. Ministerial acts can be amended by the court at any time; but it is otherwise in regard to matter which forms a part of the accusation; this cannot be amended, but must be strictly proved. 1st Arch. Crim. P. P., p. 78, note 1; same, p. 100, note 1.

Mr. Justice MACARTHUR stated the case and delivered the opinion of the court:

The case comes here on a certificate of the justice holding the criminal court, to determine whether that court erred in allowing a criminal information to be amended at the trial of the cause.

The defendant was prosecuted in the police court of this District upon an information charging that, "at place of business known as house No. 1601 Q street, northwest, in the city of Washington, District and county aforesaid, he did unlawfully engage in the business of keeping a place where distilled and fermented liquors, wines, and cordials are sold in less quantities than one pint at a time to the same purchaser, to wit, a tippling-house." The information was under oath, and the defendant, upon being convicted, took an appeal to the criminal court. On the trial of the appeal, it appeared from the testimony of the witnesses for the prosecution that the defendant committed the offense at house No. 1601 Twelfth street, instead of the place alleged in the information. The attorney for the District then moved the court for permission to amend the information by striking out the words "known as house No. 1601 Q street, northwest." The counsel for the accused objected on the ground that the information could not be amended at the trial of the cause and after the prosecution had closed their testimony. The presiding justice allowed the amendment, and the counsel for defendant excepted; the jury returned a verdict of guilty, and the case is certified to determine the legality of said amendment.

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The third section of the statute organizing the police court provides—

“That prosecutions in said police court shall be by information *under oath*; ‘but any party deeming himself aggrieved by the judgment of said court may appeal to the criminal court, held by a justice of the supreme court of the District of Columbia, and in such case the appeal shall be tried on the information filed in the court below, certified to said criminal court, by a jury in attendance thereat, as though the case had originated therein.’”

It will be seen that the statute requires that the accused party shall not be deprived of his liberty unless the charge of guilt is preferred against him by the sworn statement of the complainant, and that the appeal in the criminal court shall be tried upon the verified accusation certified as the one in the court below. But if amendments are allowed affecting the charge against the defendant without verification, the statute is to that extent disregarded, and he may be convicted of a charge that is partly upon oath and partly not.

It is contended that the amendment was authorized by the act of the late legislative assembly of June 25, 1873, which provides that technical or clerical errors may be amended in the police court on motion at the time of the trial or on appeal to the criminal court. It is apparent, however, that this act does not extend to anything material to the charge, and was simply designed to prevent a failure of justice from mere formal or ministerial mistakes.

The motion by the prosecuting officer was for leave to strike out the words “known as house No. 1601 Q street, northwest,” as surplusage, it not being necessary to prove the house laid.

It will not be denied that an information, like an indictment, must set forth the facts and circumstances constituting the offense, and that the verification extends to every part of the charge. The allegation in question describes the place in which the offense was committed. A tippling-house, like a disorderly house or a house of ill-fame, is local in its very nature. To aver its particular locality is, therefore, quite pertinent and consistent in a pleading of this kind. It is an elementary rule of criminal law, that where an offense is described with circumstances of greater particularity than is requisite, these

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circumstances must be proved. Roscoe Cr. Ev., 102. Now, although the general mode of stating the offense to have been committed in the District of Columbia would quite likely be held sufficient, had that been the original form of the allegation, yet inasmuch as the place is made material by the pleading, it must be proved as alleged. It cannot be rejected as surplusage, or treated as an informal error.

It is true that criminal informations which are not founded upon oath could be by the common law amended at any time before trial. They were regarded as the suggestions of the officer making them, and it was therefore competent for him to make any further suggestion on the record upon good cause shown to the court. But this rule is of no importance in the case of an information required in particular by the statute to be upon oath. Still, as this pleading is not the finding of a grand jury, we are disposed to hold that it may be amended on general principles by the police court at any time before the trial therein, but in such case it must be resworn to, the same as when originally presented, so that the accused may enjoy the right of preparing his defense to the new statement of the charge.

In this case, however, we are all of opinion that the amendment was erroneous, and the variance fatal to the prosecution. The defendant is entitled to his discharge.

**MARY C. CAMPBELL vs. THE AMERICAN POPULAR
LIFE-INSURANCE COMPANY.**

AT LAW.—No. 5707.

A person obtaining a policy of life-insurance may agree that the surgeon-in-chief of the company shall decide whether one of the conditions upon which the policy issued has been complied with, and his decision will be binding.

Where one of the conditions in the policy is that the insurance-money is to be paid, if, in the opinion of the surgeon-in-chief of the company, the party insured did not die of intemperance, nor by any disease produced or aggravated by intemperance, it was held that this was a valid condition-precedent, and that its performance must be averred or its non-performance accounted for.

If, however, the surgeon is also a stockholder whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition.

The case is stated in the opinion of the court.

E. L. Stanton and A. S. Worthington for plaintiffs.

George Bliss, of New York, and William A. Cook, for defendants.

Mr. Justice MACARTHUR delivered the opinion of the court:

This is an action upon a policy of life-insurance, and one of the conditions upon which the insurance was to be paid reads as follows :

“That in the opinion of the surgeon-in-chief of this company, the party insured did not die of intemperance, with which disease the party is now, or is supposed to be, affected, nor by any disease produced or aggravated by said disease.”

At a former term, this court determined that this was a valid condition, and that its performance must be averred in

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the declaration, or its non-performance accounted for. (2 Bigelow Ins. R., 16.)

The first count of the present declaration sets up the following averments by way of excusing the non-performance of the condition :

“And the plaintiff further says that, at the time said policy was issued, as aforesaid, and at the time of the death of the said Nathaniel H. Campbell, as aforesaid, one A. N. Gunn was, and till this suit commenced continued to be, the surgeon-in-chief of the defendant; that at said times and during said period said A. N. Gunn was interested in the determination of the question whether said Nathaniel H. Campbell died of intemperance, or of disease produced or aggravated thereby, among other things in this: that he, said Gunn, was the owner of certain shares of stock in said company, the defendant herein, of great value, to wit, the sum of four thousand dollars, upon which dividends of large sums of money, the exact amounts of which are to the plaintiff unknown, were from time to time, before and after the times aforesaid, declared and paid by said defendant to said A. N. Gunn, and the value of said shares of stock and the extent of said dividends were at the time aforesaid, and before and afterwards, affected by the payment of claims against the defendant and the refusal to pay them. The plaintiff further says that the foregoing facts relative to the interest of said Gunn in said company were concealed from her by the defendant at the time said policy was made and accepted by her, and for a long time thereafter, to wit, till after the death of said Nathaniel H. Campbell, and that she was utterly ignorant of the same till after this suit was commenced.”

There are several special pleas, among them the 3d, 4th, and 5th, which are the only ones now to be considered, and which set up the condition relative to the finding of the surgeon-in-chief, and the non-performance of that condition by the plaintiff as a defense; but they do not take any issue as to the averments in the declaration, that he was interested in the matter to be decided by him, and that his interest was concealed from the plaintiff by the defendant when the policy issued, and that she was ignorant of the same until after the commencement of this suit. And, in this respect,

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a majority of the court are of opinion that the pleas are bad in substance. It is scarcely necessary to suggest that parties may agree to such terms and conditions as they mutually consent to in their contracts, and they may constitute any one an arbitrator to determine matters of controversy both in law and fact. It is always advisable that the person so selected should be free from interest, but in this respect the party may use his own discretion, and when he is fully aware of the objection and yet constitutes a person so interested an arbitrator, he is bound by his decision. I know of no authority to controvert this position; while the authorities which sustain it are quite numerous. The plaintiff in this case, for instance, agrees to refer the question whether the party insured did not die of intemperance, to the opinion of the surgeon-in-chief of the company. She thereby waived any objection to that officer on the ground of any supposed partiality or bias growing out of the circumstance that he was in the employment of the other contracting party. She was aware of his relation to the company by the policy itself, and, notwithstanding, consented that this matter might be referred to him. The case is different with respect to an arbitrator having a direct interest, and where the party selecting him has no knowledge of that circumstance, and from whom the fact of such interest is concealed, as is the case here conceded by the present state of the pleadings. We think, therefore, that the averments of the declaration fully excuses the non-performance of that condition; and that the plaintiff may properly object to the decision of the surgeon-in-chief.

We are of opinion that the alleged misconduct of the surgeon in deciding the matter submitted to him is sufficiently put in issue by the fifth plea. For the reason already assigned, however, the demurrer is sustained, and the parties have leave to amend pleading according to their stipulation.

WYLIE and OLIN, JJ., dissenting.

ALFRED HOSS vs. THOMAS WILSON ET AL.**IN EQUITY.—No. 1701.**

- I. The plaintiff entered into a contract by which he agreed to employ the defendants in the prosecution of a number of claims against the United States which he held as agent for other persons, and he was to have one-third and the defendants two-thirds of the fees. It was then stipulated, "that in the cases of T. J. Cohan, Nicholas Culliton, and P. Moran, the fees shall be equally divided between the parties hereto." Held, that, as to the cases here specifically mentioned, the agreement was independent and not affected by the stipulation in relation to other cases.
- II. It is no defense to a bill charging defendants with having collected the claims specified in the agreement and praying for a discovery and an account, to set up that plaintiff had made false representations at the time of entering into the contract as to the amount and character of the other claims which he would probably procure, and that he had failed to obtain other cases for the defendants to prosecute.
- III. When a case involves both discovery and account, it is within the jurisdiction of a court of equity.

STATEMENT OF THE CASE.

The bill sets out an agreement in writing in which the plaintiff is party of the first part, and the defendants parties of the second part, dated August 15, 1866, the material clauses of which are expressed as follows:

"That whereas the party of the first part is agent for a large number of persons having claims against the United States, with power to employ attorneys for the prosecution of said claims; now the said party of the first part agrees to employ the said parties of the second part to prosecute and collect all the claims he now has or may hereafter have as agent for the claimants, and the said parties of the second part agree to use their best energy and skill in the prosecution of said claims.

"And in consideration of the premises, the parties hereto agree that the party of the first part shall have one-third and the parties of the second part two-thirds of all fees that

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may be received for the prosecution of said claims, after deducting all expenses.

"It is, however, agreed that in the cases of T. J. Cohan, Nicholas Culliton, and P. Moran, now in the hands of the parties of the second part, the fees received shall be equally divided between the parties hereto, after deducting the expenses.

"The party of the first part agrees to furnish, without delay, to the parties of the second part a list of all the cases he now has in his possession for prosecution.

"It is understood that the claim of John Williams, of Knoxville, Tenn., now in the hands of the party of the first part, is one of the cases included in the terms of this agreement.

"The party of the first part, by this agreement, only binds himself to use all exertions to secure to the parties of the second part the necessary legal authority from the claimants to prosecute the claims herein mentioned, and not to employ other agents or attorneys for the purposes for which this agreement is made."

The bill avers that the claims of Cohan and Moran, specially mentioned in the agreement, have been collected, and prays an account of the receipts and expenses, and that defendants be required to pay the amount due the plaintiff by the terms of said contract.

The answer of Thomas Wilson, who only was served, or has appeared, admits the residence, agreement, &c., and avers—

"That the plaintiff failed entirely to deliver any such claims to the defendants, or to employ them, or to cause them to be employed by any such persons as he represented himself to be agent for, and this defendant avers that since the signing of said agreement no claim against the United States has come into the hands of the defendants, or either of them, through the plaintiff, or any exertion of his; and the defendant denies the right of the plaintiff to bring this action in a court of equity, and says he has a certain, speedy, and adequate remedy at law."

The answer also admits that all the fees in the two cases already mentioned have been collected by the defendants,

and that \$500 expenses had been incurred and paid, but sets up, by way of defense, "that the said agreement was made and entered into by the defendant upon the representations made by the plaintiff at and before the time of signing, that he was the agent for a large number of persons; that the amount of said claims was about \$200,000, and that such representations, when made, were false and fraudulent, and made with intent to deceive and mislead defendants."

The answer further sets up "that the principal consideration of the agreement was that the plaintiff should use his best exertions, so that the defendants should be employed as attorneys for such persons as the plaintiff was agent for," and avers that the plaintiff failed entirely to employ the defendants, or cause them to be employed.

Such was the case upon the bill and answer. A deposition on behalf of the complainant constituted the only proof upon the hearing, which is not necessary to be stated, as the case was decided upon the pleadings above.

John D. McPherson for complainant :

The bill sets out a contract between the appellant and appellee, by which the appellant bound himself to pay to the appellee one-half of the fees which he should realize from certain claims of persons therein named which the appellee had placed in his hands for collection, less the expenses incurred; and the bill avers that two of said claims had been collected, and prays an account of the receipts and expenses. This is the sole ground on which the suit proceeds, but of this not a word appears on the defendants' abstract. The defendants' answer admits the contract as stated, admits the receipt of the fees, and states the amount of expenses; but of all this not one word appears in the abstract.

But the bill, in stating the agreement, states a fact which concerns future operations contemplated by the parties as well as that part which promises the plaintiff pay for what he had done, and this part of the bill is all that the plaintiff refers to in his "abstract." To the averments in regard to

this part of the contract, and his denial of performance on the part of the plaintiff, he confines his abstract exclusively.

Now, this part of the bill contained nothing *necessary* to the plaintiff's case; his equity was not founded on it; and it was stated only as a part of the writing on which the claim was prosecuted.

The agreement contains two distinct parts: First, as to claims already placed by plaintiff in defendants' hands; and, second, as to claims the plaintiff was thereafter to furnish. As to the first class, he had done all he was to do; it remained only for the defendants to do their part. As to the second class, the plaintiff was yet to take the first steps, *i. e.*, to secure them.

These two stipulations were entirely independent. They related to different claims, each having no possible connection with the other. Every claim brought its own profits and its own expenses. It was just as if the plaintiff had delivered one hundred barrels of flour at a fixed price, and promised to deliver one thousand bushels of wheat at a different price. And the defense is, that, as he did not deliver the wheat, he cannot recover for the flour.

Such an agreement makes a separable contract, not an entire one. "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be separable." Parsons on Contracts, pt. 2, ch. 1, sec. 4, and cases cited.

This being so, and the defendants admitting the whole case of the plaintiff as to the fees in the Cohan and Moran claims, the plaintiff is entitled to recover for those cases.

Thomas Wilson, in person, and *Enoch Totten* of counsel for defendants :

Where a bill is filed basing the right of action upon a contract made between the parties, and it avers performance on the part of the plaintiff, and the answer joins issue on this, and says he "failed entirely" to perform that which he was bound by his contract to perform, in such a case the burden

of proof is upon the plaintiff, and he must prove his case or fail.

This is such an elementary proposition of pleading and practice, that I can hardly be required to cite authorities in support of it, but they can be found, if necessary.

The decree appealed from, is in conflict with the proposition above laid down. The proposition seems to me to be so plain, that I can only account for the decree as having been passed by a misapprehension. It is true the answer charges that the representations made by the plaintiff were fraudulent, and that his promises, as set forth in the agreement, were false promises, and that he could not, and never intended to, perform them when he made them. But this makes no difference. The answer charges positively he did not keep or perform these promises. I have yet to know that the defense of non-performance of the promises made in a contract will be obviated or set aside because it is added that the man lied when he made the promises, and never intended to keep them.

Mr. Justice WYLIE delivered the opinion of the court :

This case presents but little calling for particular notice at the hands of the court.

Defendants were attorneys practicing before the Court of Claims, and entered into a contract with the plaintiff, by which they agreed to divide with him the net proceeds of the cases which he should procure for them, after deducting all expenses attending their prosecution. It was stipulated, on his part, that he would exert himself to obtain claims which the defendants should prosecute.

There were four cases, however, specially named in the contract, which the plaintiff had already procured. One of these was prosecuted by the defendants to a successful result, and all the fees were collected by the defendants. About \$500 were expended in procuring evidence, and otherwise in preparing the case for trial. Defendants then paid the plaintiff \$500; but refused to pay him any more, on the ground, as they allege, that he had made false representations to them as to the amount and character of the other claims

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which he had undertaken to secure for the common benefit ; and this is the sole ground of defense on the merits.

We think that, as to the four cases already procured by the plaintiff and specially mentioned in the contract, the defense ought not to be sustained. As to them, the agreement was, in itself, independent, and not to be affected by the stipulations in relation to other cases or other business which was thereafter to be sought for or secured by the plaintiff. Admitting that the plaintiff had made misrepresentations as to the amount of business he promised to procure in the future, the falsehoods were innocent of any damage to the defendants, for they parted with no money and expended no labor upon their faith in them.

The payment of the \$500 on account of the claim in question, though absurdly enough called in the answer a "*bonne bouche*," was a clear acknowledgment of the validity of plaintiff's claim to a share of the fee in this case by itself.

The only point of the least difficulty in this case is that of jurisdiction ; but that was determined at a previous term of the court in favor of the plaintiff, on the ground that the case involved both discovery and account, and is not now open to question, and we think was properly so decided.

The decree at special term is affirmed.

MITCHELL, SURVIVOR, ETC., vs. GEO. SEITZ ET AL.

EQUITY.—No. 2973.

- I. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors.
- II. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds, and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by funds which he had furnished.
- III. The earnings of a married woman are still the property of the husband, notwithstanding the act of Congress permitting married women to obtain and hold property in this District.

STATEMENT OF THE CASE.

This is a judgment-creditor's bill, filed November 6, 1872, by Mitchell, surviving partner of Harper and Mitchell, against George Seitz and Mary E. Seitz, his wife, principal defendants, and certain other defendants whose rights are not affected by the decree passed in the cause. The bill alleges judgments obtained by plaintiff against George Seitz in 1868, and in full force from that time to date of filing of bill, and that execution has been issued and returned *nulla bona*. It further alleges sundry purchases of real estate, made nominally by Mary E. Seitz, and in her name, in 1870 and in October, 1872; and charges specifically that said real estate was purchased really by George Seitz, and was paid for with money earned by him alone, and not by his wife; further, that the said real estate was conveyed to Mary E. Seitz with the fraudulent purpose of thereby hindering and delaying the plaintiff and other judgment-creditors of George Seitz.

The answer of defendants, George and Mary E. Seitz, denies all fraud, and alleges that both pieces of property embraced in said bill were purchased out of Mary E. Seitz's "own means and money—money earned and procured wholly by herself, and not from the said George, nor by or through

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him or his exertions." How it was earned, or from whom it was procured, is not stated. A general replication was filed to the answers, and testimony was taken by defendants, Seitz and wife, to show that Mrs. Seitz acquired the means of purchasing property by engaging in the business of keeping boarders, who averaged about four in number, and the profits were proved to be but small. No other means of acquisition in Mrs. Seitz were made to appear in the testimony. The interest of the other defendants arose out of certain trust-deeds which need not be stated, as they were held to have been executed in good faith, and were therefore superior in equity to the judgments of complainant.

On the hearing below, a decree was directed to be entered in favor of the plaintiff, not affecting, however, the rights of the other defendants as already mentioned. From this decree George and Mary E. Seitz appealed to the general term.

Samuel L. Phillips and *R. Ross Perry* for complainants.

1. The cardinal rule of equity pleading, "that a defendant who submits to answer must answer fully," has never been modified to any greater extent than this, viz, that he need not answer to any matter from a discovery of which he might have protected himself by demurrer or plea. Story's Eq. Pl., § 847, note 1; Equity Rules, Sup. Court U. S.; Equity Rules, 33, Sup. Court D. C.

2. Whatever the opinion of the court might have been in regard to the sufficiency of the answer, had the case been set for hearing on bill and answer, it is submitted that, after replication filed and proofs taken on the part of the plaintiff, it was incumbent on the defendants to rebut any evidence tending to establish the fraud charged by the plaintiff. In the absence of such proof, a mere reliance on the denial, in terms of the bill itself, of the facts on which the fraud rested, is suspicious. Such an answer is unsatisfactory, and the presumption is against it, and not in its favor. *Clark's Executors vs. Van Riemsdyk*, 9 Cranch, 160; *Callan vs. Statham*, 23 Howard, 477; *Parker vs. Phetteplace*, 1 Wallace, 684.

3. Although fraud is not to be presumed, yet positive proof is not required to establish its existence. Circumstances may

prove it as conclusively as direct positive testimony. *Kempner vs. Churchill*, 8 Wallace, 362; *Davis vs. Calvert*, 5 Gill & Johnson, 303; *Curtis vs. Moore*, 20 Maryland, 95; *Newman vs. Cordell*, 43 Barbour, 449; *Bullock vs. Narrott*, 49 Ill., 62; *Floyd vs. Goodwin*, 8 Yerger, 490; *Rogers vs. Hall*, 4 Watts, 359; *McConiche vs. Sawyer*, 12 N. Hamp., 396; *Land vs. Jeffries*, 5 Ran., 599.

A. G. Riddle and Francis Miller, for George and Mary E. Seitz :

Where there is no positive proof of fraud, circumstances of suspicion are not enough to ground a decree upon. 3 Atkins, 536; *Conrad vs. Nicoll*, 4 Pet., 259; *United States vs. Arrando*, 6 Pet., 716; *Hager vs. Thomson*, 1 Black, 91; *Clarke vs. White*, 12 Pet., 194, 196.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, &c. Equity Rules, 40 and 43, Sup. Ct. U. S.; Equity Rule, 33, Sup. Ct. D. C.

The defendant must answer the whole of the statements and charges contained in bill, and all interrogatories legitimately founded upon them. Story's Eq. Pl., § 847, n.

Office of an answer twofold. Story's Eq. Pl., § 850.

If plaintiff conceives an answer to be insufficient, he may take exceptions to such answer. Story's Eq. Pl., § 781.

But after replication, it is too late to object to sufficiency of answer. Story's Eq. Pl., § 867, 877.

Answers under oath, if responsive to bill, will prevail, unless overcome by two witnesses, or one witness and corroborating circumstances. Story's Eq. Pl., § 875 a, and note.

Interrogating part of bill should be framed with such certainty as to bring out all the facts required by the exigency of the case. Story's Eq. Pl., § 265.

Mr Justice WYLIE delivered the opinion of the court :

This is a bill by a judgment-creditor of George Seitz, to subject to execution a house and lot in this city, the title to which is in the name of Mary E. Seitz, wife of the said George. The judgments in question were obtained in 1863. The property in question was purchased, part of it in 1870,

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and the other part in 1872. The bill charges that it was bought with the money of the husband, and that the deeds were made out in the name of the wife for the purpose of committing a fraud upon the husband's creditors.

The answer denies all fraud, and alleges that the property was paid for by the wife's "own means and money—money earned and procured wholly by herself, and not from the said George, nor by or through him or his exertions."

Such an answer to such a charge appears to us to be entitled to very small, if any consideration. It is most vague and unsatisfactory, sets up no fact, contains nothing to satisfy the mind upon the subject, does not say how the money was earned or procured, or from what source—only that it was "earned and procured." As we understand these terms, they mean that Mrs. Seitz by means of her own exertions earned the money during coverture; that it did not come to her by gift, or by bequest, but that in some way, in trade, in keeping boarding-house, or by other such business, she had procured the money with which the property in question was purchased. In this sense, the answer, so far from denying the charge of the bill, amounts to a confession of its truth. For, notwithstanding our recent act permitting married women to obtain and hold property in their own right, the earnings of a married woman are still the property of her husband, as much as they were, at common law.

But, in addition to this, the evidence in the cause establishes the fact beyond all controversy, at least beyond all doubt in our minds, that the property in question was paid for by the money of George Seitz himself.

It is true that Mrs. Seitz performed the duty of a wife, and aided her husband in her own sphere, and that they kept a few boarders, and thus, possibly, some small profits were made. But these profits, if any, were very insignificant in comparison with the value paid for the property, and, besides, they belonged to the husband.

On the other hand, he was carrying on the business of a baker, with an extensive custom, making money, and not paying his debts.

The decree of special term is affirmed.

Mr. Justice OLIN dissenting.

CATHARINE JACOBS vs. THE NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA.

AT LAW.—No. 10849.

Evidence may be given under the general issue, showing misrepresentations in the statements made in an application for life-insurance, which by the terms of the instrument constitute part of the policy.

This was an action on a policy of life-insurance. The defendant pleaded the general issue. On the trial of the case the policy was given in evidence, and among other conditions in the instrument was one, that the "statements and declarations made in the application for the policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health, habits, or circumstances of the person insured, affecting the interests of said company."

It was also provided that, in case of the violation of any of the conditions, the policy was to become null and void.

The defendants further gave in evidence to the jury testimony tending to show that certain of the statements made in said application for insurance, relative to the physical history of the person insured, were untrue, but the justice who tried the case instructed the jury that the defendant was not entitled to any evidence under the general issue, tending to show that misrepresentations were contained in the application, and excluded such testimony from their consideration. A verdict was rendered for the plaintiff, and, on a bill of exceptions taken by the defendants, the court in general term reversed the judgment, holding that misrepresentations in an application for a policy of life-insurance, as to the previous health and physical condition of the person whose life is insured, is a good defense under the general issue.

I. G. Kimball, with whom was R. T. Merrick, for the plaintiff.

Edwin L. Stanton and A. S. Worthington for the defendant

JOHN FALLON vs. THE CHRONICLE PUBLISHING COMPANY.**AT LAW.—No. 11072.**

The plaintiff, who is a newspaper-carrier, alleges that a former proprietor of the Daily Morning Chronicle agreed to give him the exclusive right to sell and deliver that paper on a certain route in Washington; that such owner sold out to another person, and that defendant has succeeded to the ownership of the paper, and that he renewed the contract with both. He alleges performance, but claims that defendant broke the contract by refusing to deliver to him any more papers. Held, that the plaintiff could not maintain an action on said contract, for the reason that it is void for uncertainty and want of mutuality; also for the reason that it is not alleged to be in writing or to be performed within a year, and is therefore void, within the 4th section of the statute of frauds.

STATEMENT OF THE CASE.

This is an action for \$6,000 damages for breach of contracts. The declaration contains three counts:

I. The plaintiff says that John W. Forney, former proprietor of the Daily Morning Chronicle, agreed with the plaintiff to give him the exclusive right to sell and deliver the Daily Chronicle on a certain route in Washington City, in consideration of \$250, and the further consideration that the plaintiff would faithfully deliver the same, and solicit subscribers therefor; said Forney to furnish as many papers as plaintiff might require for a reasonable compensation, and plaintiff to receive from subscribers a reasonable advance price therefor, said contract to continue as long as plaintiff should faithfully perform his part thereof.

That on January 3, 1871, said Forney sold said paper to John M. Morris; and on June 16, 1871, the defendant was incorporated by act of Congress, and succeeded to the ownership of said paper; and said contract was renewed by the plaintiff with both said Morris and the defendant.

That the plaintiff always performed his part of said contract faithfully; but since July 1, 1873, the defendant broke the

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contract, by refusing to deliver him any papers, and by delivering directly to the subscribers.

II. The second count is substantially the same as the first, except it alleges the contract was made directly with the defendant on the 16th June, 1871.

III. The third count states another similar contract and like breach thereof for another route, made December 9, 1872.

To this declaration the defendant demurs:

1st. Because the alleged contract is void for uncertainty and want of mutuality.

2d. Because said contract is not alleged to be in writing, and shows a contract not to be performed within the year, and is void under statute of frauds.

3d. Because said contract is in restraint of trade, and is therefore void as being against public policy.

4th. Because neither of the three counts allege the damage suffered for the separate and specific injury complained of.

And the defendant demurs specially to the 1st count of the declaration:

1st. Because it does not state when the contract between plaintiff and John W. Forney was entered into.

The plaintiff joins in the demurrers.

The circuit court sustained the demurrers to the declaration, and the plaintiff appealed.

Enoch Totten, for the plaintiff, insists:

First. The demurrer was sustained below on the ground that the contract declared upon was within the statute of frauds, and therefore void, because by the terms thereof it "was not to be performed in one year."

The agreement set out in the declaration does not fall within the statute. Brown on the Statute of Frauds, secs. 276, 278, 279, and 282.

Second. The contract set forth in the declaration is good and is well pleaded. 1 Chitty's Pleadings, 297.

W. Penn Clarke and *William A. Cook*, for defendants, argued the following points:

1. *The contract, as alleged in the declaration, is void for uncertainty and want of mutuality.*

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The adjudicated cases on this question are numerous and uniform. Among the earliest is that of *Lees vs. Whitcomb*, 5 Bingham, 34, where it was held that a written agreement "to remain with A B two years for the purpose of *learning a trade*," is not binding for want of reciprocity—namely, an engagement in the same instrument on the part of A B *to teach*. This is, in fact, the leading case. So, in *Sykes vs. Dixon*, 1 P. and D., 463, an agreement by A to *work* only for B, without an engagement by B to *employ* A, was held not binding. And to the same purpose are the following cases: *Bates vs. Cost*, 3 D. and R., 676; *Livingston vs. Rogers*, 1 Caines, 583; *Tucker vs. Woods*, 12 Johns., 190; *Keep vs. Goodrich*, 12 Ib., 397; *Townsend vs. Fisher*, 2 Hilton, 47; *Ballingall vs. Bradley*, 16 Ill., 373; *Sims vs. McEwen*, 27 Ala., 461; *Nounenbaker vs. Hooper*, 4 E. D. Smith, 401. And in *Livingston vs. Rogers*, 1 Caines, 583, it was expressly decided that mutual promises, to be binding, *must be concurrent and obligatory on both parties at the same time*.

2. *The contract alleged, not being in writing, shows a contract not to be performed within the year, and is void under the statute of frauds.*

The earliest and leading case on this subject is the well-known one of *Boydell vs. Drummond*, 11 East., 142, in which it was held that a parol agreement to become a subscriber to the *Boydell Shakspeare*, which was published in numbers, which undertaking, in the contemplation of the parties, could not be performed or brought to a close for several years, was within the statute of frauds, and was, therefore, void. In another case, *Birch vs. The Earl of Liverpool*, 9 B. and C., 392, a contract whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, was determinable at any time within that period upon the payment of a year's hire, was an agreement to be performed within a year, and came within the prohibition of the statute. So in *Bracegirdle vs. Heald*, 1 B. & A., 722, an agreement for a year's service, to commence at a subsequent day, being a contract not to be performed within the year from the time of the agreement, must be in writing, and, therefore, no action could be maintained for the breach of a verbal

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contract made on the 27th day of May, for a year's service, to commence on the 30th of June following.

Modern cases are consistent with these early decisions, giving a construction to the fourth section of the statute of frauds, and without going into them at length, we refer to the following: *Hinkley vs. Southgate*, 11 Vermont, 428; *Foote vs. Emmerson*, 10 Ib., 338; *Drummond vs. Burrell*, 13 Wend., 307; *Squire vs. Whipple*, 1 Vermont, 69; *Cabot vs. Haskins*, 3 Pick., 83; *Derby vs. Phelps*, 2 N. Hamp., 515; *Wilson vs. Ray*, 13 Indiana, 1; *Shute vs. Darr*, 5 Wend., 204; *Sower vs. Winters*, 7 Cowen, 263; *Hill vs. Hooper*, 1 Gray, 131.

And the fact that the contract has been performed in part will not take the case out of the purview of the statute. Otherwise, if it has been fully performed. Upon this point see *Henin vs. Butlers*, 2 App., 119; *Baldwin vs. Palmer*, 6 Seld., 232; *Pierce vs. Payne*, 2 Wms., (28 Vermont,) 34; *Browne on Stat. of Frauds*, 448.

Nor need the statute of frauds be pleaded where it appears from the record that the contract relied upon comes within its provisions. *Amburger vs. Marvin*, 4 E. D. Smith, 393; *Smith vs. Fah*, 15 B. Monroe, 443; *Osborne vs. Endicott*, 6 Cal., 149; *Thurman vs. Stevens*, 2 Duer., 609.

CARTTER, Ch. J., delivered the opinion of the court :

The judgment of the circuit court must be affirmed in this case for two reasons :

1. For want of mutuality in the contracts sued upon.
2. Because the contracts come within the fourth section of the statute of frauds, requiring contracts not to be performed within a year to be in writing.

Judgment affirmed.

PETER W. GALLAUDET vs. JAMES SYKES.

AT LAW.—No. 10605.

- I. A bill of exchange on three months drawn in New York, upon S. in the city of Washington, and by him accepted for the accommodation of the drawer, and returned to such drawer in New York, where he negotiated it, upon an agreement that the person making the discount should retain a sum greatly beyond the rate of interest allowed by the laws of that State; it was held that the validity of the contract was to be determined by reference to the statute of New York, which declared a contract void when usurious, and that consequently the bill now in suit was void for that reason.
- II. An acceptance is to be deemed a contract of the place where it is made; but where it is solely for the accommodation of the drawer, it is not a contract capable of being enforced until the paper is transferred to a holder for a valuable consideration, and the place of such transfer is to be regarded as the place of the contract, especially when no other place of performance is mentioned.

The case is stated in the opinion of the court.

Enoch Totten, for plaintiff, made the following points:

1st. The acceptance in this case was made in the District of Columbia, and it was payable there; hence the laws of the District govern the contract. Story on Bills, §§ 158, 164; Story on the Conflict of Laws, §§ 317, 333, 334.

2d. The usurious bargain, if there was any, was made between Parkman and a stranger, who is neither a party to the suit nor to the bill of exchange.

Francis Miller, for defendant, cited the following authorities:

Andrews vs. Pond, 13 Pet., 78; *De Wolf vs. Johnson*, 10 Wh., 383; *Dunscombe vs. Bunker*, 2 Met., 8; *Van Schaack vs. Stafford*, 12 Peck, 565; *Cook vs. Moffat*, How., 295; *Davis vs. Clamson*, 6 McL., 622; *Gaither vs. Farmers & Mechanics' Bank of Georgetown*, 1 Pet., 37; *Munn vs. Com. Co.*, 15 John., 55; *Lee vs. Selleck*, 33 N. Y., 615; 2 Parsons, N. & B., 378-9, note, p. 337; *Hyde vs. Goodnow*, 3 Comst., 569.

Mr. Justice MACARTHUR stated the case and delivered the opinion of the court :

This action is brought against the defendant as the acceptor of the following bill of exchange :

\$3,000.—[Stamp.] “NEW YORK, 1st *October*, 1872.

“Three months after date pay to the order of the drawer three thousand dollars, value received, and charge the same to account of

E. PARKMAN.”

“To JAMES SYKES, Esq.,
Washington, D. C.”

The words “Accepted, James Sykes” are written across the face of the bill.

The defendant interposes the plea of usury, and sets up the following facts as to the origin of the bill: That Parkman, who is the drawer, on the 1st day of October, 1872, at the city of New York, corruptly agreed with one Horace Winans that Winans should loan to the said Parkman \$3,000 upon said bill of exchange for three months, and should retain \$600 for illegal and usurious interest on said bill, and that afterward Parkman drew and forwarded the bill, in pursuance of such unlawful agreement, to the defendant, who accepted it solely as an accommodation acceptor, and without any knowledge of the said illegal contract relating thereto; and that Parkman, in pursuance of the aforesaid usurious agreement, delivered the accepted draft to Winans, who retained the sum of \$600 for the loan and forbearance for the period of three months.

The statutes of New York declaring usurious contracts void, and that the sum so retained by Winans was in excess of lawful interest, and that, by force of the statute aforesaid, the said bill became void, are all properly alleged in the plea.

The plaintiff replies that the bill was drawn by Parkman in the city and State of New York, and directed to the defendant in the city of Washington, where it was accepted by the defendant; and that the same was discounted by the plaintiff for a valuable consideration before it became due, in good

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faith and in the regular course of his business as a banker ; and the defendant demurs to this replication on the ground that it is bad in substance, and does not avoid the plea of usury.

Upon this issue the defendant contends that the bill of exchange in suit is a New York contract, upon which there has been taken a greater rate of interest than the law of that State allows, and there can be no doubt that if the law of New York is to furnish the rule of the contract, it must be declared usurious and void. The bill is dated in New York ; it was drawn there ; the alleged usurious agreement was made there, and the money was obtained and no doubt used in that city. The agreement for usury was entered into before the draft was forwarded to Washington ; the defendant accepted it in ignorance of that circumstance, and without any consideration, and solely for the accommodation of the drawer. It was accepted here by the defendant, and then forwarded to New York, where it was passed over to Winans as a security for a loan of money. The bill was not only drawn in New York, but it had its inception there for the first time as a contract ; and the parties who gave it this obligation of a contract were subject to the law of New York. It is quite true that acceptances are deemed contracts of the place where they are made. Still, the acceptance here, being solely for the accommodation of the drawer, is not deemed in law a contract until it becomes capable of being enforced.

The accommodation acceptor is not liable until the paper is transferred to a holder for value before it becomes due. It then becomes a contract and can be enforced. The bill, therefore, had its origin in New York ; it was consummated there ; the money was loaned, and the security delivered, in that place ; it is dated there, and no other place of performance is designated in the contract. Upon this state of the pleadings, a majority of the court are of opinion that the validity of the transaction must be determined by reference to the law of New York, and as that law declares the contract void when usurious, the demurrer was properly sustained below, and the judgment is affirmed.

OLIN and HUMPHREYS, JJ., dissenting.

THOMAS CROFT vs. BALTIMORE AND OHIO RAILROAD COMPANY.

AT LAW.—No. 10789.

- I. Where a through-line for transportation of passengers and freight is established by the owners of different railroads, the first carrier who receives fare for the whole route, and gives a through-check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line throughout the entire distance.
- II. Where three companies constitute a through-line, and the fare received for through-tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability.
- III. No other company can be sued for a loss unless such occurred on its own line.

STATEMENT OF THE CASE.

This is an action for damages against the Baltimore and Ohio Railroad Company as a common carrier of goods for hire. The facts appearing from the bill of exceptions are, that the plaintiff purchased an emigrant through-ticket from New York to the city of Washington, and received through-checks for her baggage; that she procured all her baggage upon reaching Washington, with the exception of the piece represented by a check introduced in evidence, and which has never been delivered to her.

The three roads which constitute the through-line, are the Camden and Amboy, the Philadelphia, Wilmington and Baltimore, and the Baltimore and Ohio Railroad Companies, and the fare received for through-tickets is accounted for by the first company to the other companies according to their established rates, but there is no division of losses.

The defendant owns and operates the railroad extending from Baltimore to the city of Washington, and by the arrangement between said companies the emigrant-baggage is transferred by the Philadelphia and Wilmington to the Bal-

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timore and Ohio Company at their station in the city of Baltimore, and there receipted for by defendant's agent; that defendant had no baggage-agent at New York; and that in point of fact the baggage in question was not received or receipted for by defendant's agent in the month of April, 1870, in the city of Baltimore, or elsewhere. Whereupon the defendant's counsel prayed the court, if the jury believed that there was such an arrangement as has been stated between the three companies, then the plaintiff was not entitled to recover without showing the receipt of the missing baggage by the agent of the defendant, which the court refused; and this constitutes the first exception, and is the only one necessary to mention in this statement.

W. A. Cook and D. E. Cahill for plaintiff.

Walter S. Cox and James A. Buchanan, for defendant, assigned the following reasons for reversing the judgment:

1st. Because the court below erred in overruling the first prayer of the defendant in the court below, as said prayer was, and is, a correct statement of the law applicable to the state of facts proved on the trial of the case at bar in the court below, and, therefore, it should have been granted. In support of this proposition the counsel for the appellant cite and rely upon the following authorities:

2 Redfield on Railways, 106, sec. 162, and cases cited in notes. *McCann vs. Baltimore and Ohio Railroad Company*, 20 Maryland Reports, 202, 203, 209, and 211. *Nutting vs. Connecticut River Railway Company*, 1 Gray's Report, 502. *Parsons's Mercantile Law*, 216, 217, note 2. *Pierce on American Railroad Law*, 143. *Elmore vs. Naugatuck Railroad Co.*, 23 Connecticut, 457. *Ellsworth vs. Tait*, 26 Alabama Reports, 733. *New York and New Haven Railroad Company vs. Hood*, 22 Connecticut Reports, 1. *Straiton vs. New York and New Haven Railroad Company*, 2d E. D. Smith's (New York Court of Common Pleas) Reports, 184, pp. 187, 188. *Briggs vs. Vanderbilt*, 19 Barbour, 222. 2 Greenleaf on Evidence, page 205, sections 210, 213. *Sanderson vs. Lamber-*

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ton, 6 Birney's (Pa.) Reports, 129. 2 Redfield's Railroad Law, 227 and 229.

And it appears from a recent case that the receiving carrier is bound to ship the goods through to their destination, and is liable for any loss which occurs on any part of the connecting line. *Nashua Lock Company vs. Worcester and Nashua Railway Company*, 48 New Hampshire Reports, 339; and reported also in 2 Redfield's American Railway Cases, 290. This case was decided in 1871; and it was further held in this case that the receipt of the goods, and the delivery thereof by the last carrier, and the payment of the charges of its predecessors, do not render it liable for damages which occurred, before the goods came on its line. (See same case, at page 305 of 2 Redfield's Railway Cases.)

Mr. Justice MACARTHUR delivered the opinion of the court:

Upon the facts stated it is quite clear that the defendant has been guilty of no negligence. The first carrier took the fare for the entire route, and gave a through check for the plaintiff's trunk, and that company is undoubtedly liable for its transportation through to Washington. It is now very well settled that, where a continuous line for transportation of passengers and freight is established by the owners of different railroads, the first carrier who receives fare for the whole route, and gives a through check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line throughout the whole distance. *Central Railroad vs. Copeland*, 24 Ill., 332; *Lock Company vs. Nashua Railroad*, 48 N. H., 330; S. C., 2 Redf. Railway Cases, 290; Redf. Railway, 109, where the authorities on this point are reviewed.

The contract of the first company is to transport the passenger and his baggage to their destination without injury and without delay, and this rule meets public convenience by giving a certain remedy for any loss happening on any portion of the through line.

An arrangement between the companies, such as is disclosed by the testimony, may resemble, but it certainly does

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not constitute, a partnership. Each company in the connection receives its portion of the fare, according to a tariff established and regulated by its own will, and with regard to which the other companies are not consulted. They divide neither profits nor losses, but each receives its own fare through the agency of the first company. It would seem unreasonable to hold them responsible upon a principle of joint liability for any loss not occurring on their own road, except the company with which the contract was made. The trunk said to be lost in this case never came into the possession of the defendant's agents to be transported, and was in fact lost on another portion of the line. The instruction, therefore, asked by defendant's counsel was improperly refused. The judgment must be set aside, and a new trial ordered.

**EDMUND CLAXTON, GEORGE REMSEN, CHARLES
C. HAFFELFINGER, AND EDWIN C. ECKSTEIN
VS. FRANCIS C. ADAMS.**

AT LAW.—No. 10117.

- I. The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress it before going into trial.
- II. Where the notice to take a deposition is entitled in the cause, and the caption is the same as in the notice, it appears to be no valid objection to such deposition that the names of the parties are not again set forth, either in said notice or caption.
- III. Where a deposition was taken of a witness residing out of the District, it seems it will not be suppressed because the party offering it did not prove that the reasons for taking it continued to exist at the time it was offered.

This is an action on account, commenced in October, 1872. The issues were closed in the case, and in February, 1873, the same were ordered on the then calendar (for January term, 1873) by the court. In March, 1873, and while the said January term of court was still in session, the plaintiffs gave notice to the defendant that they would proceed to take the deposition of George Remsen, and other witnesses, on the 17th of March, 1873, before a United States commissioner in Philadelphia. This notice was entitled (as was also the deposition itself) *Claxton et al. vs. J. C. Adams*, No. 10,117, at law, and was addressed to defendant's attorney, and signed by the plaintiff's attorney.

No commission to take the deposition was issued by the court, but the same was taken in pursuance of said notice, and returned in the clerk's office of this court on the 20th of March, 1873. The case came on for trial March 11, 1874, and a jury was sworn to try the same.

The plaintiff offered to read in evidence the deposition so as aforesaid taken, to which the defendant objected. The objection was overruled; to which ruling the defendant excepted.

The deposition being all the evidence, judgment was given for the plaintiffs.

The exception presents the question, whether the circuit court erred in overruling the defendant's objections.

James G. Payne, for plaintiff, urged the following points:

The caption of the notice and deposition were such that there could be no uncertainty about the case, and the deposition was properly allowed to be read. *Buckingham vs. Burgess*, 3 McLean, 368; *Merril vs. Dawson*, Hemp., 563; and, also, *Goodyear vs. Vosburg*, 41 Howard, (N. Y.) pr. 421.

These objections should have been made before entering upon the trial of the cause. This is the invariable rule where the ground of objection is disclosed by the deposition. Where there is time and opportunity to move for a suppression of the deposition, an objection to it will not avail on the trial. The proper way to exclude the deposition was by motion to suppress. 1 Tidd's Practice, 812; *York County vs. Central Railroad*, 3 Wallace, 107, 175; *Wynans vs. New York and Erie Railroad Company*, 21 How., 88; *Toledo, &c., vs. Baddely*, 54 Ill., 101; *Robinius vs. Liste*, 30 Ind., 142; *Irby vs. Kitchell*, 42 Ala., 438.

The objection made in the fourth point of the defendant's brief was not made at the trial, nor does it appear in the bill of exceptions, and it is not, therefore, properly before the court for review. It is, however, fully met and disposed of by Greenleaf, in his work on Evidence, vol. 1, sec. 323, and note 1. (See, also, *Patapsco Insurance Company vs. Southgate*, 5 Pet., 604; *Pettibone vs. Derringer*, 4 Wash., 215; 1 Starkie on Evidence, 277.)

John N. Oliver for defendant:

It is contended that the deposition so taken and offered to be read should not have been admitted, for the reasons —

1. The notice was given and the deposition taken during the term of the court at which the cause was set for trial. *Allen vs. Blunt*, 2 W. & M., 122.

2. That it did not appear, either in the caption of the

notice or the deposition, that the notice was given or the deposition taken in this cause. *Peyton vs. Veitch*, 2 Cr. C. C., 123; *Waskern vs. Diamond*, Hemp., 701; *Allen vs. Blunt*, 2 W. & M., 122.

3. "In the caption to a deposition the parties must be correctly described; and, in order to this, the Christian and surnames of the parties, both plaintiff and defendant, must be set forth. It is not a correct or accurate description of the parties defendant to name them 'Seneca Smith and others.'" *Haskins vs. Smith*, 17 Vermont Repts., 268.

4. The practice in the United States courts has been, when a deposition is taken under the judiciary act and it is not proved by the party offering it that the reasons that existed for taking the deposition still exist at the time it is offered, the deposition will be rejected, or the case continued for the production of the witnesses or retaking of the deposition. *Waskern vs. Diamond*, Hemp., 701; Chief-Justice Marshall's Opinion in the *Thomas & Henry, Fletcher and Parker, Claimants, vs. The United States*, 1 Brockenborough, 367.

It is submitted that the chief-justice erred in admitting the deposition. A new trial should be granted with costs.

CARTTER, C. J., delivered the opinion of the court:

The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress before going into trial. The objections in this case, therefore, came too late, even if they would have been good on a motion to suppress; but if called upon to pass upon the sufficiency of the objections, the court is inclined to the opinion that the same are not well taken. Judgment affirmed.

United States vs. King et al.

UNITED STATES, USE OF EDWARD HALLORAN,
PATRICK HALLORAN, PETER HALLORAN, KATE
HALLORAN, STEPHEN HALLORAN, JOHN HAL-
LORAN, BY THEIR GUARDIAN, JAMES BIGGINS,
vs. ZEBULON M. P. KING AND J. D. MCGILL.

AT LAW.—No. 10686.

The act of Maryland of 1720, chapter 24, section 2, declaring that a creditor shall not prosecute an action on an administrator's bond before *non est inventus* or *nulla bona* has been returned, has no application to an action in the name of heirs at law, upon said bond, to recover the distributive share of the estate.

STATEMENT OF THE CASE.

This is a joint action brought against William Albert King, as principal, and Z. M. P. King and John D. McGill, as sureties, upon the administration bond given by William Albert King, in the late orphans' court of the District of Columbia, the condition of which bond was that the said "William Albert King shall well and truly perform the office of administrator of Thomas Halloran, deceased, according to law, and shall in all respects discharge the duties of him required by law as administrator aforesaid, without any injury of damage to any person interested in the faithful performance of said office."

It was proved at the trial that the said William A. King, as such administrator, on September 1, 1868, filed his first and final account, from which it appeared that \$1,258.68 was in his hands for distribution; that he had been cited several times to appear by the late orphans' court, and that in the year 1873 two of these citations had been returned *non est*; and that the summons in this case had been returned *non est inventus*. It appeared also that the said King (the administrator) was ordered to distribute the amount above found in his hands among the six children of the deceased, or \$208.66 each, and that he had paid two of them in full, but that all six were joined as plaintiffs in the case. It also ap-

peared that he had distributed \$128 among the other four. The suit was discontinued as against Z. M. P. King, the other surety, as he was in bankruptcy.

The action is founded upon the act of Maryland of 1720, chapter 24, by which it is provided "that it shall not be lawful for any creditor or creditors to prosecute any such administration or testamentary bond for any debt or damages due from or recovered against any testator or intestate, or their effects, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *feri facias* returned *nulla bona*, * * * or such other apparent insolvency or insufficiency of the person or effects of such executor or administrator as shall, in the judgment of the provincial court that hears the cause, render such creditors remediless by any other reasonable means save that of suing such bond." * *

The defendant McGill, by his counsel, requested the court to instruct the jury that "If the plaintiffs have failed to prove that any *non est inventus* has been returned by the marshal upon a summons issued against William Albert King, the administrator, and also failed to prove that any *nulla bona* had been returned upon a *feri facias* against said William Albert King, then they must find for the defendant," which instruction the court refused to give; but in lieu thereof instructed the jury that if they should find from the evidence that said administrator had been cited to appear and settle his accounts and to make distribution of the fund in his hands among the heirs at law of said deceased, and had failed to do so, and that the plaintiffs were unable to make the money out of said administrator, then they should find for the plaintiffs for whatever appeared from the evidence to be due.

And the jury thereupon rendered a verdict for the plaintiffs, whereupon the defendant's counsel made his exceptions to said refusal to charge the jury, and also to instructions given to the jury by the court.

The case is now here upon this exception.

I. G. Hine for plaintiffs.

Fred. W. Jones contra.

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By the COURT:

The act of the assembly of Maryland refers in express terms to creditors, and has special reference only to suits prosecuted by that particular class of claimants. The expression of creditors in the statutes excludes all other interests. The action in this instance is in the name of the heirs at law or distributees, and not in that of creditors. We are therefore of opinion that the act in question has no application to the case at bar.

Judgment affirmed.

THE UNITED STATES vs. AUGUSTUS C. BUELL.

AT LAW.—No. 12304.

The police court of the District of Columbia has no jurisdiction in case of a criminal prosecution for libel.

STATEMENT OF THE CASE.

This was a prosecution in the police court by way of information charging the defendant with libel. On the defendant's petition, filed in this court, a writ of *certiorari* was issued to said police court, in obedience to which the case was certified to the circuit court. There a motion was made by the district attorney to quash the writ; and the circuit court ordered that motion to be heard at the general term in first instance.

Geo. P. Fisher and *A. G. Riddle* for the United States.

William Birney for the defendant.

CARTTER, C. J., delivered the opinion of the court :

The court have concluded, in this case, to overrule the motion to quash the writ of *certiorari*. This conclusion necessarily involves the construction of the first section of the statute creating the police court. That section is as follows :

“Be it enacted, &c., That there shall be established in the District of Columbia, a court, to be called the police court of the District of Columbia, which shall have original and exclusive jurisdiction of all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes; that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary.”

The question made here is whether, in view of that section,

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the police court has jurisdiction of libel. If it is an offense not infamous, and not punishable by imprisonment in the penitentiary, the police court would seem to have jurisdiction. If not, it is left where the creation of that court found it.

We have come to the conclusion that the crime is, or may be, a penitentiary offense. The police court cannot impose the penalty contemplated, or adequate to the offense; and the fact that that court cannot impose the punishment is conclusive upon its jurisdiction of the crime. That court cannot punish by imprisonment in the penitentiary, nor for any longer period than one year in the jail. There is a misconception of power in the court below, and the power to prosecute does reside in this forum; and therefore the motion to quash is dismissed.

Mr. Justice MACARTHUR concurred in the views expressed by the chief-justice.

By Justice HUMPHREYS:

As this is a question of some importance, it is eminently proper that any judge who has a reason for his opinion may state it. I fully coincide with the chief-justice in the conclusion arrived at.

I base my opinion, however, on this: that neither in the word or spirit of the act creating the police court is it contemplated that that class of cases which rise above what the act denominates "simple assaults and batteries, and other misdemeanors not punishable in the penitentiary," shall be tried in said court. It is a mere police court, to regulate such minor offenses as are necessary to keep and preserve order in the community.

It is named and denominated "The police court;" and when you rise above any little simple offense, the right of trial by jury exists, and the guarantee must be preserved. That court has no jury, and it is beyond the reason and spirit of the statute to give it jurisdiction of such offenses.

By Justice OLIN:

I find a difficulty lying still back of the statute creating the police court, which is found in the amendments to

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Article V and VI of the Constitution, which provides "that no person shall be deprived of life, liberty, or property without due process of law;" and that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

If a man's liberty or property can be taken in a criminal prosecution by a police magistrate, without jury-trial, why then his life may be taken; and he might as well hang a man, under an act of Congress authorizing the police court to do so, as to deprive him of his liberty and property.

Mr. Justice WYLIE:

I wish to be understood as not expressing an opinion upon any case but that now before the court. I want to be understood on this occasion as expressing the opinion that the police court would have no jurisdiction, even if the punishment for the crime of libel was limited to one year, or less, in the jail. It is certainly an infamous crime, and surely it ought to be so when it is done for hire, as when one is hired to libel another for money. As to the trial of the crime of libel, I never heard of its being tried by any jurisdiction except by jury.

We do not hear of any cases, where a jury-trial existed at all, that a man could be tried and punished for the crime of libel without a jury. In England it was formerly held that the jury should have power to pass upon the fact of publication anyhow; and afterward, by act of Parliament, it was provided that the jury should have power to pass upon the motive also.

So I take it that a court without a jury has no jurisdiction whatever over the crime. I am satisfied that under this law it was not the intention of Congress to confer jurisdiction on the police court to try anybody for libel.

JOHN A. STEELE vs. CHARLOTTE STEELE.

IN EQUITY.—No. 3444.

A husband cannot maintain a suit for divorce solely on the ground that his wife has denied matrimonial intercourse to him.

The plaintiff filed a bill in this case for a divorce from the defendant, his wife, on the ground of desertion. The desertion complained of is, that the defendant withdrew from his bed, and denied him matrimonial or sexual intercourse; that he continued to remain in the same house with the defendant for a considerable time thereafter, and then removed to another house, whither the defendant did not go; that subsequently the complainant requested the defendant, through a friend, "to live with him again as his wife," and she replied that "he could come and live in the house, but she would not live with him as his wife, *i. e.*, she would have no matrimonial intercourse with him."

The bill prayed for divorce *a vinculo matrimonii*, on the ground of desertion.

The proofs established that the complainant and defendant were lawfully married in September, 1865, and that there were — children from the marriage, and that the defendant had assigned as a reason for denying matrimonial intercourse to the complainant that she did not desire to have any more children.

The case was submitted upon bill and testimony to the court below, and a decree was made dismissing the bill. The case is now here on an appeal from that decree.

W. P. Peirce, for complainant, made the following points:

The plaintiff maintains that he is entitled to a divorce from the bond of matrimony under an act of Congress, approved June 1, 1870, and asks that the decree dismissing the bill be reversed on the following grounds:

1. That the withdrawal of the defendant from the matrimonial bed of the plaintiff, for the uninterrupted space of two

years, was desertion within the meaning of the statute. (See Bishop Mar. Div., 3d ed., sections 506, 510; Browning, Laws Mar. Div., page 113, &c.)

2. That the removal of the plaintiff from the house in which they were domiciled, being the natural and intentional result of the defendant's conduct toward him, constitutes desertion on the part of the defendant. (See *Hodges vs. Hodges*, 1 Esp., 441; *Camp vs. Camp*, 18 Texas, 528; Greenl. Ev., sec. 18, &c.; Bishop Mar. Div., 3d ed., sections 517, 525; Schouler's Dom. Rel., 1st ed., 54.)

3. That the subsequent refusal of the defendant to domicile with the plaintiff "as his wife," and also the fact that she now remains in a separate domicile, the result of no wrong on the part of the plaintiff, constitutes desertion on the part of the defendant. (See Bishop Mar. Div., 3d ed., sections 728, 514; Kent's Com., 8th edition, 2d volume, 174.)

No appearance for defendant.

The Court were of opinion that the statute in regard to divorce did not confer authority upon the court to decree a dissolution of the bonds of matrimony on the grounds set up in this case.

The chief-justice, while concurring in the judgment, expressed the opinion that a denial of the marital right of intercourse, when continued for a period of two years, should be regarded as a desertion within the meaning of the statute unless such denial was made in consequence of inability from sickness, or other sufficient cause, in good faith.

Order appealed from affirmed.

ANDREW NOERR AND JOHN G. BUTLER, ADMIN-
ISTRATORS, &c., OF SOPHIA E. COLTMAN, vs.
CHARLES J. BREWER.

The act of March 3, 1865, providing "that in actions by or against executors, &c.; neither party shall be allowed to testify against the other, as to any transactions with, or statements by, the testator," &c., applies to actions in the supreme court of the District of Columbia. The principle is again announced, that this is a court of the United States.

STATEMENT OF THE CASE.

On the trial of this case the counsel for the defendant requested the justice presiding to require the defendant to testify as to a transaction with the plaintiff's testator on the 8th of February, 1871, which said justice refused to do. The defendant then offered himself as a witness, and his counsel offered to prove by him what occurred between himself and the testatrix, Sophia Coltman, on the said February 8, 1871, with relation to the bonds in controversy. Plaintiff insisted he was not competent for the purpose offered, and the justice refused to allow him to testify. Defendant excepted to such ruling. The verdict was in favor of the plaintiff.

Riddle and Miller for the plaintiff.

James G. Payne, for the defendant, contended that—

The court erred in refusing to allow the defendant to testify.

The act of Congress approved July 2, 1864, provides, "that upon the trial of any issue joined, or other proceeding, in any court of justice in the District of Columbia, the parties thereto are competent and compellable to give evidence *viva voce* or by deposition," &c. 13 Stats. at Large, 374.

In the civil appropriation bill passed by the same Congress, it is provided "that in the courts of the United States there

shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried." 13 Stats. at Large, 551.

On the 3d of March, 1865, this act was amended by adding the proviso, "that in actions by or against executors, &c., neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator," &c. 13 Stats. at Large, 533.

This amendatory act makes no reference whatever to the act first above cited, and as it does not amend or modify that act in terms, neither can it be held to do so by implication. It is specific in its terms and application. Had it repealed the statute which it amends or modifies, parties to suits in the courts of this District would still be competent witnesses under the act first above cited, and which was passed expressly for this District.

By the COURT :

The act of Congress approved July 2, 1864, applies in terms only to courts in the District of Columbia, and the act of March 3, 1865; extends to the courts of the United States, without express reference to this District; but we have had occasion at least twice to declare that this is a court of the United States, and in this determination we have been sustained by the Supreme Court of the United States. We again announce it emphatically, and that a general law relating to such courts in language like the one in question, necessarily applies here.

Judgment affirmed.

WHITE ET AL. vs. FREEDMAN'S BANK.

EQUITY.—No. 2779.

- I. Leased premises were used as a hotel, and the lessee executed trust-deeds on the furniture to secure the parties from whom he purchased and to other creditors. Subsequently the landlord accepted in lieu of the lessee another tenant, who bought out the lessee and assumed the payment of all rent in arrear, and of all liens upon the furniture. Upon the faith of this agreement the tenant paid all the back rent, and the rent accruing for some time afterward, to the landlord. He also paid off a large portion of the claims secured by the deeds of trust. Held, that the balance due upon such trust-deeds had priority over the landlord's lien for rent, and that there was a change of tenantry as well as of property in the furniture.
- II. A landlord will lose his lien by conduct which misleads bona-fide purchasers for valuable consideration.
- III. Where trustees have moneys in their hands claimed by a landlord upon his lien for rent, and by creditors having trust-deeds on the furniture on the rented premises, a bill of interpleader will be sustained when the fund is not sufficient to pay both.

STATEMENT OF THE CASE.

The plaintiffs in this cause filed their bill against the Freedman's Savings and Trust Company, and Beall & Baker, and alleged that, by virtue of several deeds of trust and a written agreement of the tenant, they sold on the 15th, 16th, and 17th days of April, 1872, the goods, chattels, and personal property in the "St. James Hotel," in the city of Washington, for the gross sum of \$5,713.80; that the defendants Beall & Baker, and the Freedman's Savings and Trust Company, each demand the money; that there is not sufficient to pay both parties; and they pray that the defendants may be compelled to interplead.

The defendants answered, and from the admissions in the pleadings, and the evidence, the following facts appear, to wit:

On the 30th day of March, 1867, Alpheus Middleton and John Hyatt, executors of the last will of Benjamin F. Middleton, deceased, and Benjamin Beall, one of the defendants,

made a lease under seal to George W. Bunker and William H. Crosby, whereby they demised to the lessees, for the term of five years from April 1, 1867, the hotel on the corner of Sixth street and Pennsylvania avenue then called the "Clarendon House," now known as the "St. James Hotel," reserving a yearly rent of \$4,000, payable in equal monthly installments on the last day of every month. The lease contained covenants for the payment of the rent, for quiet enjoyment, that the tenants should not sublet without the written consent of the lessors, and to renew the lease on a specified prior notice.

On the 6th day of April, 1867, Bunker & Crosby, the lessees, being indebted to A. T. C. Dodge for the purchase money for the goods, chattels, and personal property in the said "Clarendon House," in the sum of \$2,500, gave their two promissory notes of that date for \$1,250 each, payable to the order of said Dodge in nine and twelve months respectively, with interest; and to secure the payment of the said notes executed and delivered to the plaintiff Orestes B. Dodge a deed of trust on the goods, chattels, and personal property in the said house.

On the 2d day of October, 1868, Crosby, with the consent of the landlords, sold out his entire interest in the said lease and personal property to George W. Bunker and Thomas M. Plowman, and retired from the concern; and on the same day Bunker & Plowman gave Crosby their two promissory notes of \$3,500 each, being for the purchase-price of Crosby's interest; and to secure the payment thereof, made and delivered to the complainant Phillips a deed of trust on the leasehold estate, all the goods, chattels, household and kitchen furniture in the said hotel, then called "Bunker's Avenue Hotel," and also on all other goods and chattels, &c., which might be put into the premises in substitution or renewal of, or in addition to, those then contained therein, and, also, on all the goods, chattels, &c., which might be put into the addition to said hotel then being erected, and on the leasehold interest in said addition. On the — day of December, 1868, an addition to the hotel was completed by the defendant Beall, which was rented to Bunker & Plowman at the rate of \$1,300 per annum, payable monthly in equal installments, and such addition was

incorporated into, and thenceforward formed a part of, the "St. James Hotel," but was the exclusive property of Beall.

On the 17th of April, 1869, Bunker & Plowman executed a deed of trust on the leasehold interest, furniture, &c., in the St. James Hotel, to the complainant Phillips, to secure to the defendants Beall & Baker the payment of an account for groceries for \$5,000, and on the 20th of December, 1869, they executed and delivered to the complainant White a deed of trust on the same property to secure to the same parties the payment of \$3,044.77.

On the 12th day of March, 1870, one of the notes for \$3,500 given to Crosby (the other being paid) was duly transferred to the Freedman's Savings and Trust Company by the holder thereof, and on the 2d day of May, 1871, one of the aforesaid notes for \$1,250 given to the said A. T. C. Dodge was transferred to said company by the holder thereof.

On or about the 10th day of April, 1871, Bunker & Plowman sold all their interest in the hotel-lease, personal property, &c., to John Spicer, who, in pursuance of his purchase, entered and took possession of the house and personal property about the 28th day of April following. Spicer so purchased the lease of the hotel, the furniture, fixtures, &c., for the sum of \$3,500 in cash, and in addition agreed and assumed to pay the rent then in arrear, and the liens upon the personal property hereinbefore mentioned, amounting altogether to about the sum of \$19,250. The \$3,500 was paid in cash to Bunker & Plowman, and a large sum for arrears of rent was paid to Beall by Spicer. This sale to Spicer was made after frequent consultations about it with Beall, who acted for himself and as the agent of the other owners of the realty, and with Beall's assent and approbation.

Upon the faith of this agreement, Spicer parted with his money, (about thirteen thousand dollars,) Bunker & Plowman parted with their property, and Beall received all the money he could get, and availed himself of all the advantages of the exchange. Before the attachment suits hereinafter mentioned, Spicer had paid all the rents due from Bunker & Plowman at the time of the sale to Spicer.

On the 30th day of August, 1871, a suit at law (No. 8849) was commenced in this court, in the name of Benjamin Beall, Alpheus Middleton, and Jesse Middleton, against Bunker & Plowman, for rent in arrear, upon which an attachment was issued and served on the personal property in the St. James Hotel. The defendants in this suit did not appear or plead, and a judgment by default was entered against them for the sum of \$925, and on the 18th of January, 1872, an execution was issued thereon and levied on the property. And on the same day a suit was commenced by Benjamin Beall against the same parties for rent in arrear, with like proceedings, and a judgment for 383.31 was entered for plaintiff. On the 30th of December, 1871, two more suits, like the others, were begun, and judgments were entered and levies made as before. These suits were begun and prosecuted to judgment, and executions were entered, as if the plaintiffs were the landlords and Bunker & Plowman the tenants of the hotel and the owners of the property, entirely ignoring the sale to Spicer and his possession. On the 15th, 16th, and 17th days of April, 1872, the complainants made sale of the goods, and this suit was brought to settle the respective right of the claimants to the fund.

The Freedman's Savings and Trust Company claim under the trust-deeds of April 6, 1867, and October 2, 1868, and the other parties claim by virtue of the statute creating liens in favor of landlords, and the judgments above mentioned.

W. D. Davidge for complainants.

Enoch Totten for Freedman's Bank :

1. The sale to Spicer, made by Bunker & Plowman, with the consent of the landlords, followed by the continued possession of Spicer, terminated the relation of landlord and tenant previously existing between Bunker & Plowman and the landlords. Taylor's Landlord and Tenant, § 514; *Phipps vs. Soulthorpe*, 1 Barn. & Alderson, 50; *Phene vs. Popplewell*, 12 C. B., (N. S.), 334; *Nicholls vs. Atherstine*, 59 E. C. L., 943; *Hammerton vs. Stead*, 10 E. C. L., 159; *Dodd vs. Acklorn*, 46

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E. C. L., 670; *Stone vs. Whiting*, 3 E. C. L., 331; *Randall vs. Rich*, 11 Mass., 493; *McKinney vs. Reeder*, 7 Watts, 123; *Grinder's Appeal*, 5 Barr, 422.

2. The tenancy having changed, the lien of the landlord, which otherwise might have been continuing, was interrupted, and the liens of the creditors by virtue of the deeds of trust attached and became prior liens. (See 14 Stat., 404.) Even if the suits at law for arrears of rent had been brought against Spicer, the trust-deed would have precedence over the landlord's lien.

3. The attachment suits against Bunker & Plowman cannot affect the property. They were not brought to recover rent for the property before the sale, but for rent claimed to have accrued against Bunker & Plowman after their tenancy had terminated.

4. These suits were not brought in the name of the proper persons, even if Bunker & Plowman had continued to be tenants.

5. The statute lien had expired as to a large part of the claims sued on, and a large part of the rent sued for was not due, at the time of the commencement of the respective suits.

Mr. Justice HUMPHREYS delivered the opinion of the court:

The trustees have in their hands moneys claimed by different parties, and this bill asks that those parties shall interplead. They have done so, and each claims priority. The contest is between a landlord's lien for rent and mortgage-creditors, on the furniture on the rented premises.

Attachments were levied to enforce the landlord's lien, but by the consent of all parties the property was sold by the trustees, the payment of which to creditors was to be postponed till this litigation should determine whether the proceeds should be handed to the landlord or the mortgagees. The questions arising are to be determined in general term in the first instance. The statute giving the landlord a lien is very explicit, and we think is somewhat plain in its terms.

After the premises were rented and taken possession of, the tenants gave a deed of trust to secure creditors, and in

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the due course of trade the notes, to secure which the trust had been executed, were transferred for value to the Freedman's Bank. The evidence shows that the money loaned by the bank on the faith of the mortgages was used by the parties in different ways in and about the affairs and business of the hotel, or in transactions connected therewith. We think the evidence further shows a knowledge on the part of the landlord that the moneys obtained on the faith of the notes and trusts did go to enable the tenants to keep up the hotel and pay the rents for one or two years. We think the evidence further shows an assent to a sale and change of tenancy on the part of the landlord; that the rents were all paid for a considerable period of time after the execution of the trust-deeds, and that there was an assent on the part of the landlord to the change of the property in the furniture, subject to the mortgages; and we think the evidence fully establishes the priority of the deeds for rents accruing after the execution and recording of the deeds; and that the proofs establish an acquiescence on the part of the landlord to the security of the trusts, whereby the lender of money would be lulled into reposing upon such security.

The statute giving landlords a lien was never intended to be used for such purpose. A landlord, like any other creditor, will lose his lien by conduct which misleads *bona-fide* purchasers for a valuable consideration.

A decree will be drawn establishing the priority of the deeds of trust in favor of the Freedman's Savings and Trust Company, a reference to the auditor and master to report to the special term as to the amounts of the trustees' accounts, and distribute the funds in hand according to the dates of the deeds, and the surplus, if any, to the landlord.

Mr. Justice WYLIE dissenting.

SAMUEL NORMENT vs. GEORGE FASTNAGHT ET AL.**AT LAW.—No. 3134.**

1. An expert cannot give his opinion whether upon the face of a conveyance of real estate it covers the premises in controversy.

STATEMENT OF THE CASE.

This action was brought by the plaintiff under the landlord and tenant act of July 4, 1864, on the 12th day of March, 1873, before a justice of the peace, to recover possession of certain premises situated on Sixth street, northwest, in the District of Columbia, and upon the trial before said justice the defendant pleaded title to the premises in James Edward Fastnacht; whereupon the said justice certified the case to the circuit court.

Plaintiff claims title by purchase at trustee's sale on the 6th day of February, 1869, by J. N. Oliver, trustee, under a deed of trust made, by George Fastnacht, and Mary Ellen Fastnacht, under a deed executed to him by said trustee, dated March 25, 1871. Mary E. Fastnacht, one of the grantors in said deed of trust, obtained title to the said premises from Margaret Fastnacht by deed dated May 12, 1856, under whom all parties claim.

Upon the purchase of said premises, under deed of trust by plaintiff, an agreement was made between the plaintiff and defendant, George Fastnacht, to rent said premises at eight dollars per month, payable monthly; pursuant to which said George Fastnacht commenced the occupation of said premises on or about the first day of June, 1869, and continued to occupy the same as tenant of the said plaintiff up to the present time, paying rent therefor twenty-three months, to May 1, 1871, without objection; since then no rent has been paid.

Plaintiff also proved that a suit was commenced by him before Justice Weaver for the recovery of two months' rent, commencing May 1, 1871; a judgment in said suit for

§80. Also, an appeal from said judgment to the supreme court of the District of Columbia; a trial of the same upon the merits in said supreme court, and an affirmance thereof.

In the deeds introduced by the plaintiff to prove his title, the description of the premises in question reads as follows:

“All that certain piece or parcel of ground, viz: The south sixteen (16) feet front on Sixth street west, being a part of the north part of lot four, (4,) in square four hundred and seventy-seven, (477,) described as follows: Beginning on Sixth street, at the northwest corner of said part of lot four, (4,) in aforesaid square, running thence south sixteen (16) feet, thence east ninety-three (93) feet four and one-half ($4\frac{1}{2}$) inches, thence north sixteen (16) feet, thence west ninety-three (93) feet four and one-half ($4\frac{1}{2}$) inches to beginning.”

When the plaintiff rested his case, one of the defendants, by his counsel, introduced William H. Ward, who proved that he had been an examiner of titles in this city for twenty-five years, and offered to prove by him that the deed from Margaret Fastnacht to Mary E. Fastnacht, dated the 12th day of May, 1856, and read by the plaintiff to the jury, did not cover the lot in dispute, but by its specific boundary covered another lot or piece of ground, to which testimony as offered the plaintiff objected, and the court sustained the objection, and decided, as a matter of law, that the deed, by its description, metes, and bounds, covered or applied to the piece of ground in dispute; whereupon the counsel for the defendants made his exceptions to the said ruling.

The defendants also offered to prove by the said witness, Ward, and to explain by him, the ambiguity which appears upon the face of the said deed, and to show that it was intended by the parties thereto that it should apply to another and different piece or parcel of ground, and not to the piece of ground in controversy; to which testimony offered the plaintiff, by his counsel, objected, and the court sustained the objection; which ruling was also excepted to.

The defendants offered no further testimony. The court instructed the jury that, as matter of law, the said deed from Margaret Fastnacht to Mary E. Fastnacht covered the premises in controversy, and they must find for the plaintiff. Verdict accordingly.

Stilson and Hawes for plaintiff :

1st. If the description is obscure, the whole should be read together, and so read as to give effect to the whole instrument, and if one or two readings is consistent as a whole, and the other is inconsistent, the consistent one will of course be adopted. Redfield on Wills, pp. 438, 439. So when the description admits of two constructions, one of which will give force and effect to it, and the other will not, the former is the proper one.

2d. Ambiguities may be patent or latent; the former appear upon the face of the instrument, while the latter do not.

Patent ambiguities cannot be explained by parol evidence, and will render the instrument to that extent inoperative, 4 Mass. Reports, 205; 7 Cranch, 267; Jarman on Wills, 315. Redfield on Wills, pp. 438 and 439, note "d," and cases there cited, decided that even the testimony of the party who drew the instrument cannot be resorted to in order to determine the particular intent in cases of patent ambiguities. Also, see 1st Greenleaf's Evidence, sections 298 to 302 inclusive.

3d. In this case the description contained in the deed is, first, a general one, and then follow the courses and distances, which are definite and unambiguous, unless as to the beginning point, which point, if construed as is claimed by plaintiff and decided in the court below, is entirely consistent with the general description which precedes it.

It commenced by the words "the *south* 16 feet," which evidently means the south 16 feet of the *north* half or part of said lot 4, as the words "the north part" (half) of lot 4, square 477, admit of no other meaning.

Then follow the words: "Beginning on Sixth street at the northwest corner of said part (south 16 feet of north half) of lot numbered 4, in the aforesaid square, and running thence," &c.

Now, had it been intended to commence at the northwest corner of lot 4, instead of the northwest corner of the south part of said lot 4, the words "part of" would have been omitted. Any other construction would be forced and unreasonable, and render the deed inoperative and void.

4th. All parties have recognized and adopted this view of the case; borrowed and loaned money upon it; occupied under and paid rent for it, and are estopped from now claiming otherwise, by their own acts and all the circumstances in the case.

Moore & Newman for defendants :

If the description of ground in a deed is ambiguous or doubtful, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation. 1 Green. on Ev., p. 350, latter part of note 2; *Atkinson vs. Cummins*, 9 How., 479; *Stone vs. Clark*, 1 Met., 378; *Crafts et al. vs. Hibbard et al.*, 4 Met., 438.

Where there is an ambiguity which impedes the execution of the contract, it is first, if possible, to be resolved on a view of the whole contract or instrument, aided by the admitted views of the parties, and if indispensable, parol evidence may be admitted to clear it. 2 Bouv. Law Dic., 286, (Construction;) *Jackson vs. Wilkinson*, 17 John., 146.

Where the language of a deed is doubtful in the *description of the land conveyed*, parol evidence of the practical interpretation, by the acts of the parties, is admissible, to remove the doubt. 1 Green. on Ev., s. 293, and authorities; *Stone vs. Clark*, 1 Met., 378; 1 Sugden on Vend., (6th edition,) 211, note 1; *Codman et al. vs. Winslow*, 10 Mass., 149.

If the premises be described in general terms and a particular description be added, the latter controls the former. 1 Green. on Ev., sec. 301.

In the description of property in a deed, specific boundaries, or metes and bounds, control courses, distances, and quantity, and if a description contains all three, and the course and distance, or quantity, be incompatible with the specific boundaries, the latter prevails.

By the COURT:

The defendant offered Ward as an expert to testify that upon the face of the conveyance of real estate it did not

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apply to or cover the premises in controversy. We think the objection was properly sustained. Experts cannot be called to give their opinions on a subject of this character. Witnesses are competent to show lines and measurements, but the construction of written instruments is for the court alone.

Judgment affirmed.

Mr. Justice HUMPHREYS dissenting.

APPEAL FROM THE DECISION OF THE COMMISSIONER OF PATENTS IN THE MATTER OF THE APPLICATION OF DEWITT C. BAXTER FOR A PATENT FOR AN IMPROVED PORTABLE FORGE

- I. An improvement described in the claim as "the combination of the hearth-plate of a portable furnace with wrought-iron tubular legs connected together, all substantially as set forth," does not indicate in any degree invention. It is simply the result of the judgment and knowledge which is expected of every competent mechanic, and is not patentable.**
- II. The properties and advantages of hollow wrought-iron legs as supports for a structure being well known, to substitute them for solid legs in a portable forge is but the application of knowledge already possessed by competent mechanics, and does not require invention.**

STATEMENT OF THE CASE.

This is an appeal from a decision of the Commissioner of Patents. The patent was refused in this case for the want of sufficient invention in the improvement. The invention consists of a peculiar manner of constructing the stands or supports of portable furnaces, with a view to the attainment of lightness, durability, and stability. These supports or legs are described in the application as made of wrought-iron tubes secured to the hearth by passing through it and receiving a screw, cap, or nut above the plate or hearth, so as to secure the same firmly. The application also states as follows:

"It has been a common practice to make portable-furnace supports either of heavy cast iron or of equally cumbersome sheet-iron in the form of a hollow cylinder, the frames or supports in either case detracting from the portability of the furnace.

"The frame or stand of wrought-iron tubes is not only economical in point of construction, but is remarkably light, and at the same time more capable of withstanding the shocks necessarily received during transportation than the heavier cast-iron frames.

In re Baxter.

"I claim as my invention :

"The combination of a hearth-plate, of a portable furnace with wrought-iron tubular legs connected together, all substantially as set forth."

The decision of the Commissioner was rendered October 21, 1872, and it is now here by appeal.

Howson & Son for De Witt C. Baxter.

Marcus S. Hopkins for the Commissioner.

CARTTER, C. J., delivered the opinion of the court :

The decision of the Commissioner of Patents is affirmed, and we adopt the reasons stated by him for our own judgment, as they fully express our views, and read as follows:

"The improvement which applicant has made in portable furnaces—and I have no doubt he has made one—consists in supporting them upon hollow wrought-iron legs, whereby sufficient strength is obtained in the legs, and at the same time they are rendered lighter than those heretofore made of solid cast-iron. But the difficulty is, as the examiner says, that the improvement 'does not indicate in any degree invention.' It is simply the result of the exercise of that judgment and the application of that knowledge (in view of the fact that wrought hollow tubes are used in so many analogous situations, where strength, lightness and economy of material are requisite) which is expected of every competent mechanic. In a less developed state of the art of making and applying tubular legs and supports, it is possible a patent such as applicant seeks might be legally granted, but not now. The references cited by the examiner are in point as showing the various applications of tubular supports analogous to applicant's, and exhibiting his as barren of invention.

The decision of the board is affirmed."

STEPHEN TALTY vs. FREEDMAN'S TRUST COMPANY.

AT LAW.—No. 9470.

- I. A claim against the late corporation of Washington, commonly called a voucher, consisting of a bill for work performed by plaintiff for the corporation, together with certificates of the proper officers that it was duly approved and allowed for the sum of \$6,096.75, is not strictly a commercial instrument; but where it has been indorsed in blank by the plaintiff and delivered to a broker as security to raise money, and no mark put on it to designate a wish to control it, or to restrict the indorsement, and as paper of this kind is extensively used for the purpose of borrowing money: Held, that the plaintiff could not maintain replevin to recover the voucher from an innocent bona-fide holder for a valuable consideration, without tendering him the amount paid therefor.
- II. Where the plaintiff made his promissory note for \$3,000, payable to his own order, and indorsed it and delivered it to a broker to get discounted, giving him the voucher as security, and the note was discounted and the proceeds paid plaintiff, and the broker claimed that the voucher was given upon an agreement that he might sell and dispose of it at any time for 90 cents on the dollar, and the plaintiff claimed that he was not to sell it until after maturity and non-payment of the note, and the broker sold it to the defendant before such maturity, for a valuable consideration, and without any notice or knowledge of such arrangement: Held, upon this state of facts it was proper for the justice who tried the case below to instruct the jury to return a verdict for defendant, as there was no proof of tender before suit brought.

STATEMENT OF THE CASE.

This is an action of replevin to recover the possession of a claim consisting of an evidence of indebtedness due the plaintiff from the corporation of Washington, and commonly called a voucher. On the trial the plaintiff proved that the voucher had been replevied and delivered to him, and that on January 6, 1872, he owned it. The bill of exceptions sets it out in the words and figures following:

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"SURVEYOR'S OFFICE OF THE DISTRICT OF COLUMBIA,
Washington, D. C., Dec. 9, 1871.

The corporation of Washington, to Stephen Talty, Dr.

To grading and graveling I street north, from 7th east to the eastern boundary of the city, in ac- cordance with an act of the corporation approved January 22, 1870, and the contract dated Janu- ary 3, 1871, viz: 21,099 cubic yards, at 17 cents per yard	\$3,586 83
13,944 square yards gravel, at 18 cents per square yard	2,509 92
	<hr/> 6,096 75

Duplicate.

WM. FORSYTH,
Surveyor of the District of Columbia."

Endorsed: "Stephen Talty."

"Office of the Auditing Commission, appointed under the act
of the legislative assembly approved June 16, A. D. 1871."

"WASHINGTON, D. C., 1871.

Received of Stephen Talty, of Washington, a claim against
the corporation of Washington, contract completed, together
with one voucher register, No. 605; amount, \$6,096.75.

Stamped, Auditing Commission.

ED. M. FAETZ, *for Clerk."*

Endorsed: "Stephen Talty."

"Claim No. 605, in favor of Stephen Talty, for \$6,096.75
(six thousand and ninety-six dollars and seventy-five cents,) has been examined and approved by the commission to audit the same.

A. S. PRATT,
Ch'rm. Comm."

"JANUARY 4, 1872."

The plaintiff was examined as a witness on his own behalf,
and swore, in substance:

"That on the said 6th day of January he employed one M.
H. N. Kendig to borrow for him the sum of \$3,000 for sixty

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days, and at the suggestion of the said Kendig delivered to him the papers aforesaid as *collateral security* for the payment of a promissory note, in the words following, but erroneously dated A. D. 1871 instead of A. D. 1872.

“ \$3,000.] “ WASHINGTON, D. C., *January 6, 1871.*

Sixty days after date I promise to pay to the order of myself, (voucher \$6,096.75, coll.,) three thousand dollars, at the First National Bank of Washington, D. C., value received, with ten per cent. int.

“ STEPHEN TALTY.”

Endorsed : “ Stephen Talty.”

“ That said Kendig took the said note and the said collateral away with him, and shortly thereafter, on the same day with the date of said note, returned and paid over to the plaintiff the amount of the said note, less the discount thereon, at the rate of ten per centum per annum ; *that the express understanding and agreement between the plaintiff and the said Kendig was that, if the plaintiff failed to pay his said note at its maturity, the said Kendig should have the right to buy said collateral at the rate of ninety cents on the dollar, if he so desired ;* that before the said note had matured, the plaintiff ascertained that said Kendig had taken up his said note ; and a day or two before it matured the plaintiff, to pay his note and obtain his collaterals, called to see said Kendig and offered to pay said note and demanded its surrender, together with the said collaterals, but the said Kendig would not accept such payment, and refused to deliver said note or said collaterals ; that the plaintiff further ascertained that said Kendig had, without his, the plaintiff's, knowledge or authority, sold said collaterals to D. L. Eaton, now deceased, the then actuary of the defendant, for ninety-six cents on the dollar, on or about the 26th day of January, A. D. 1872, and said Kendig had taken up said note on the said 1st day of February, A. D. 1872, and still held the same ; that said actuary had presented said collaterals to the chairman of the committee of indebtedness of the house of delegates, D. C., on said 26th day of January, and received from him said claim, No. 605.

“ That he caused his duly-authorized agent to demand of

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the said actuary the surrender of his said claim to him, which demand was refused by the said actuary, and thereupon the plaintiff brought this suit; that subsequently he, the plaintiff, collected the whole amount of his claim, and executed a receipt therefor." And there rested his case.

The defendant in its behalf gave evidence to the jury tending to show that when the said collateral voucher was pledged by said plaintiff to said Kendig, it was agreed by and between said Kendig and said plaintiff that said Kendig might, if he should so elect, sell or take the said voucher at ninety cents on the dollar, at any time before the maturity of the said note; and that said Kendig did elect to sell the said collateral voucher, and out of the proceeds of such sale took up said note, and afterward offered to pay the balance of the proceeds of the voucher, computed as aforesaid at ninety cents on the dollar, to said plaintiff, before the maturity of said note; and that said plaintiff refused to take or accept the said money; and the said Kendig also testified as follows:

"Q. The only transaction between yourself, as you claim it, was a transaction between yourself and the Freedman's Bank, was simply the sale of the collateral?

A. Yes, sir.

Q. You claim to be its owner?

A. Yes, sir.

Q. Did you say anything to Colonel Eaton about your transaction with Mr. Talty?

A. No, sir; not that I know of.

Q. You did not tell him how you came by it, from whom you got it, or what you paid for it, or what you had to do with it?

A. No sir; I certainly never told him what I paid for it."

And that no tender of any kind was made by the plaintiff to the defendant before the commencement of this suit; and that said Kendig was a broker and negotiator of loans at the time of the pledge to him; and that it was understood at the time by said plaintiff that he, said Kendig, did not have the money himself, but must procure the same for said plaintiff on the note and said collateral security, from some other person; and that said Kendig received no commission or com-

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pensation from the plaintiff for his services, but relied for his compensation upon the option given to him by the plaintiff to sell or take said voucher at ninety cents as aforesaid, thus getting the benefit of the rise in the market, if any should occur. That he sold the said voucher to the defendant at ninety-six cents on the dollar, and afterward, and before the maturity of the said note, the said Kendig told the plaintiff he had so sold said voucher, and offered to account with him therefor at ninety cents on the dollar, which offer the plaintiff rejected.

And after all the evidence in the cause had closed, the court charged the jury as follows:

“Gentlemen of the jury, you may render your verdict for the defendant in this cause. The verdict will be that the defendant is entitled to a return of the property replevied, or its full value; and you will assess its value at what you think has been proved to be its value in the market;” to which charge and each and every part thereof the plaintiff excepts, and the case is now here upon this exception.

Joseph H. Bradley, jr., for plaintiff, with whom was *A. G. Riddle*, made the points following:

1st. The issue in this case was eminently a question of fact, namely: What were the terms of the contract made between the plaintiff and the witness, M. H. N. Kendig, under whom the defendant claims title?

It is the exclusive province of the jury to judge of the weight of the evidence; and it is error to charge that the plaintiff cannot recover, if by any possible construction the testimony will support the action. *Bank of Washington vs. Triplett*, 1 Pet., 25; *S. P. Jewell vs. Jewell*, 1 How., 219; *Walter vs. Alexander*, 2 Gill, 204; *Grove vs. Brien*, 1 Md., 438; *Cole vs. Hebb*, 7 G. and J., 28, *et seq.*

2d. It was error to charge the jury “to return a verdict for the defendant,” inasmuch as—

a. The chattel replevied was a mere chose in action, and possessed none of the attributes of negotiable paper, and was not assigned by the plaintiff to defendant's vendor.

b. Kendig, the broker, took no equitable title by its delivery

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into his possession, if the plaintiff's proofs are true, which was a question for the jury.

c. Nor had he authority, express or implied, to sell the collateral; certainly not before the note matured and was not paid.

Enoch Totten, for defendant, relied upon the following points:

1. That the indorsement in blank and delivery of the voucher by the plaintiff to a broker for the purpose of being negotiated, and the sale of the voucher by the broker to the defendant, vested in the defendant a perfect title to the security, whether there was a verbal agreement between plaintiff and the broker that a sale should be made or not. *Baldwin vs. Ely*, 9 How., 570.

2. If the voucher was given as a pledge or pawn only, then it is clear that the defendant took all the interest the broker or pawnee possessed, and was entitled, at least, to all the broker's rights at the time of the sale. And to enable the plaintiff to maintain replevin, it was necessary that he should first have made a tender to the defendant of the amount due from him on his note. Without such tender he had no right to the possession of the voucher. *Demainbroy vs. Metcalf*, 2 Vernon, 691; *Little vs. Baker*, Hoff. Ch., 487; *Jarvis vs. Rogers*, 15 Mass., 408; *Baldwin vs. Ely*, 9 How., 580; 3 Parsons on Con., 274; Story on Bailments, § 327; *Lewis vs. Mott*, 36 N. Y., 395; *Donald vs. Suckling*, Law Rep., 1 Q. B., 585; *Johnson vs. Stear*, 15 C. B. (N. S.), 330.

Mr. Justice HUMPHREYS delivered the opinion of the court:

Replevin was instituted by plaintiff to recover a claim against the corporation of Washington, duly approved, passed upon and allowed, in amount six thousand ninety-six dollars and seventy-five cents. Plaintiff was anxious to have money in the early part of 1871, and prevailed on M. H. N. Kendig to raise the sum of three thousand dollars. He executed his note, payable to the order of himself, dated January 6, 1872, at the First National Bank of Washington, D. C., for three thousand dollars, interest ten per cent., sixty days after date,

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indorsed said note, and at the same time delivered and indorsed to said Kendig, as collateral security, a paper denominated a voucher, signed by proper officers, evidencing a claim of plaintiff against the corporation of Washington for six thousand ninety-six dollars and seventy-five cents, the consideration of which was shown by another paper to be for work done by said Talty, and which he had indorsed.

On January 26, 1872, said Kendig sold said claim or voucher to the defendant, a banking corporation in the city, for ninety-six cents on the dollar.

It is not pretended or claimed that the bank, or any of its officers controlling negotiations, knew of any understanding or arrangement, if any was made, between Talty and Kendig, other than the indorsement, which was in full and unrestricted. The plaintiff now claims that it was agreed between him and Kendig that if "plaintiff failed to pay his note at maturity, the said Kendig should have the right to buy the collateral at the rate of ninety cents on the dollar, if he so desired." This is his own statement in evidence. He further states that he offered to pay Kendig the amount of the note a day or two before its maturity, but Kendig refused to receive such payment, or to deliver to him the note which he (Kendig) had taken up, or the said collateral.

There was no mark or memorandum on the voucher indicating that it was a mere deposit as collateral, but the indorsement was in blank. When demand was made on defendant to surrender the voucher, no tender was made of any money. Defendant gave evidence tending to show that it was agreed between plaintiff and Kendig that said Kendig might, if he elected, sell or take the said voucher at ninety cents on the dollar at any time before the maturity of the note; and that, after Kendig sold the voucher and took up the note, he offered to pay plaintiff the balance of proceeds of the voucher at ninety cents, to be computed, deducting the amount of the note, which plaintiff declined to accept. The circuit court charged the jury to return a verdict for defendant; and to that plaintiff excepted.

On the plaintiff's own evidence, what was there for a jury to pass upon? Here was an indorsement in blank of a paper, the character of which, in all towns, is used upon

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which to raise money. This class of evidences of debt may not in strictness be denominated commercial instruments, but they have certainly assumed somewhat of a negotiable character, or at least they so far enter into the facilities of obtaining and borrowing money that no court will be found to cast the burden of litigating as to the equities between the parties upon an innocent bona-fide holder for a fair valuable consideration.

The questions which might arise between Talty and Kendig certainly cannot all arise in this suit. Persons who put forth paper upon which they wish to raise money should always mark it, designate it, if they wish to control it. And when they do this, how much money could be raised on a ten-thousand-dollar security in three months?

Hard, unconscionable bargains may be relieved against, and the party who is guilty may be controlled. But no rule authorizes the visitation of a man's own error upon a *bona-fide* third one. In this case a fair price was paid by the bank for the property in the paper. Plaintiff has not offered to return any part of the money which was given by defendant for the evidence of debt. On the plaintiff's evidence alone, we are bound to find full authority in his broker, Kendig, to sell and dispose of the vouchers. If this be so, the court would have been too liberal to have sent the jury out to consider.

Every rule with which we are acquainted, as sustained by justice and the rigidity of legal technicalities, demand an approval and affirmation of the judgment of the circuit court, and the affirmance of that judgment is hereby ordered.

Mr. Justice OLIN, after stating the case, delivered the following dissenting opinion :

It will be seen that, upon this recital of facts, a most material discrepancy appears from the record as to what the nature of the arrangement was under which this collateral was delivered to Kendig. The testimony on the part of the plaintiff is that this certificate of indebtedness was simply delivered over to Kendig as collateral security for the payment of the \$3,000 note. The testimony for the defendant

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is, on the contrary, explicit to show that this certificate of indebtedness was delivered to him upon condition that he was at liberty to sell and dispose of it, at any time he might elect, at a price not less than ninety cents on the dollar.

If the true version of this transaction is that claimed on the part of the plaintiff, and which his evidence tends strongly to prove, then I think the judge erred in directing a verdict of the jury for the defendant. If the true transaction was such as the evidence on the part of the defendant tended to show it, the verdict was right. According to that, said Kendig was authorized to sell said voucher or certificate of indebtedness at any time, even before the maturity of the note.

It is agreed that the sale of the voucher was actually made before the maturity of the note.

I understand that the cause was decided in the court below against the plaintiff; that no legal tender strictly in conformity with the rules of common law was made, before suit brought, of the amount of the note.

If the transaction between the plaintiff and Kendig was as the plaintiff's testimony tends to show, no tender of any kind was a necessary condition to maintain a suit to recover possession of this certificate of indebtedness; and to show this I will only cite a case of *Wilson vs. Little and others*, 2 Comstock, 443; a case precisely in point, unless the defendant got a better title to this certificate of indebtedness, or chose in action, than Kendig had, which will scarcely be pretended, as the vendor of the personal chattel can give to the vendee no better title than he himself possessed.

The error of the court was, I think, therefore, in taking the cause from the jury, and not submitting to them the question whether the testimony on the part of the plaintiff was the true version of the agreement between the plaintiff and Kendig in reference to the delivery of this certificate of indebtedness. Had I been sitting as a juror, quite likely I might have come to the conclusion that the arrangement between Talty and Kendig was such as the testimony on the part of the defendant tended strongly to prove; but this was an action at law, and the facts in the case were to be found by the jury.

APPEAL FROM THE DECISION OF THE COMMISSIONER OF PATENTS IN THE MATTER OF THE APPLICATION OF J. L. PENNOCK FOR LETTERS-PATENT FOR IMPROVEMENTS IN ROLLING-MILLS AND IN APPLIANCES CONNECTED THEREWITH.

- I. If a chain is attached to a shaft rotated by the same mechanism as the rolls in a rolling-mill, the other end being furnished with grappling-irons by which the heated pile is drawn from the furnace and placed upon a platform suspended from a crane, when it is swung by the crane to the rolls, the whole machinery constitutes the proper subject of a patent. (Wylie and Olin, associate justices, dissenting.)
- II. And a patent is valid which describes such machinery, and contains the following claim, viz: "In a rolling-mill, the revolving shaft with its drum-chain and grapple, or any equivalent power-driven hauling mechanism, in combination with a crane, arranged and operating in connection with the said mechanism to receive the fagot from the same and deliver it at the rolls." (Wylie and Olin, associate justices, dissenting.)
- III. Whether the inventive faculty has been exercised, is a question of evidence, and is always to be considered in reference to the condition of the art and the result accomplished; and where the combination is new, and the benefit great, the presumption is strongly in favor of originality.

The case is sufficiently stated in the opinion of the court.

Howson & Son, for J. L. Pennock, among other observations made the following:

Your honors will bear in mind that the applicant set about doing a thing which no one had dared to do before, the removal of a pile from the bed of a furnace to the rolls at one operation, and by one combination of co-operating appliances.

When your honors remember this, and call to mind the wonderful results as regards the saving of labor, you will agree with us that the applicant is entitled to the claim he asks for.

It is true that in framing a combination to carry out his bold

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views the applicant had to call to his aid old materials, but he put them together as they had never been brought together before; the very novelty of the undertaking demanded a novel combination. Are we to belittle the applicant's combination because he used old materials in effecting it? As well might an adverse criticism of a novel specimen of architecture be based solely on the antiquity of the bricks which entered into its composition.

The decisions relating to this subject are all one way, and are too familiar to your honors to demand lengthened quotations. We may, however, be permitted to refer to the case of *Clark's Steam and Fire Extinguishing Company vs. Copeland*, 2 Fish., 227, where the judge said: "Old instruments placed in new and different organizations producing different results may be patentable. If the inventor supplies to what is old some new organization, and thus produces a better practical result, he is entitled to protection." Then there is the well-known case of *Forbush vs. Cook*, 2 Fish., 688, in which it was declared that "it is decisive that a new mode of operation has been introduced if the practical effect of the new combination is either a new effect or a materially better effect."

"The courts have uniformly held that where the combination of known elements produces useful results not before attained, then the person who discovers or applies the combination is an inventor within the meaning of the patent-laws."

The recent decision of the United States Supreme Court, in the case of *Haines & Treadwell vs. Van Warmer et al.*, Official Gazette, Vol. 5, No. 4, has a decisive bearing upon the present case. The court said: "It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made; but the result must be a product of the combination, not a mere aggregate of several results, each the complete product of one of the parts. Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect, without the production of something novel, is not invention."

The applicant has done something more than combine

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old devices ; his invention consists of an old element and a new element combined in one organization for the attainment of one new result.

But let us suppose for a moment that the crane with its platform is an old device, in order to bring the combination within the category of those referred to by the supreme court, patentability would then depend, in accordance with the above ruling, on two questions : First, is there a new result ? and second, does the result depend upon the combination and co-operation of the elements claimed ?

An affirmative answer of these questions must be decisive of patentability.

The result is the removal of the pile from the bed of the furnace to the rolls, a duty which neither of the elements can accomplish alone, but by so combining the hauling mechanism with the crane that the latter will receive the pile directly from the former, such a co-operation of the two elements is insured that the extraordinary result above related is brought about, a result which the Supreme Court would consider the best evidence of patentability. Will not the fact that one of the elements of the applicant's combination is a new element enhance its patentability ?

Marcus S. Hopkins for the Commissioner :

The references show that all these devices are old ; but it does not appear that they have all of them been employed heretofore in precisely the relation to one another here exhibited. Furnaces have always been built convenient to the rolling and forging machinery, so that a heated mass of metal could be readily transferred from them to be forged or rolled. Cranes have commonly been employed in forging, by the use of trip-hammers, as illustrated in Fig. 2, to swing the heated metal from the furnace to the anvil, under the hammer. Machinery operated by hand, and power-driven hauling mechanism are old, and in common use, for hauling a heated pile out of a furnace to be rolled. *Le Technologist*, tome 26, p. 47, Eng. Pat. No. 2,761, of 1868 ; patents of D. N. Williams, March 19, 1867, and Wm. Stephens, August 15, 1871. But in rolling-mills, instead of a crane, a car or truck has usually

been employed to receive the heated pile from the furnace and convey it to the rolls.

Appellant's alleged invention consists in substituting a crane in place of a truck, for this purpose. Instead of resting his platform, for receiving a heated pile, on wheels, and rolling it to the rolls, he suspends it on a crane and swings it to them. In other words, he adopts the mode in use for conveying a heated mass of metal from a furnace to an anvil, to convey it from a furnace to a pair of rolls. This the Commissioner holds does not amount to an invention. The combinations of devices in common use, such as exhibited in Figs. 3 and 4, where a truck is employed instead of a crane, he regards as equivalent combinations to that claimed, within the meaning of the law. It has long been established that the novel organization of co-operative elements of machines into a useful mechanism is invention, whether the elements be individually old or new. *Buck vs. Hermance*, Fish. P. R., p. 251; *Evans vs. Eaton*, Peters, C. C. R., 343; *Barrett vs. Hall*, 1 Mass., 474; *Pennock vs. Dialogue*, 4 Wash., 543; *Footte vs. Silsby*, 2 Blatch., 270. But there must be *substantial* novelty, else the alleged new combination will be no more than an equivalent of preceding combinations. *Buck vs. Hermance*, 1 Blatch., 404. For instance if A, B, and C, in certain relations, form an old combination, and C is a nail having its ordinary functions in the combination, A, B, and D, (D being a screw having its ordinary functions,) in like relations, would not, I submit, form a new combination in such a sense as to be patentable; notwithstanding, as is well known, a screw holds much better, and in many situations is vastly superior to a nail. Substituted for a nail in such a case, it would no doubt render the effect of the combination better. But the reason such a substitution would not be ground for a patent is, that the combination thereby formed would involve the same idea, and operate upon the same principle and in the same manner as the former, and, therefore, it would be in essence the same thing. So the substitution of a crane for a truck does not effect a new and patentable combination; because the combination, after the substitution, considered as a unit, operates upon the same principle, and in the same manner, and accomplishes the same result as before. If the crane

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swings the pile by the application of less force than is required to push the car, that is a well-known incident, appertaining to it in all situations, and is not due to this alleged invention. It does the same, whether it carries the heated metal from the furnace to an anvil—as it has been employed to do from time immemorial—or to a pair of rolls. It is, in this case, clearly the mere alternate or equivalent of the truck, and certainly ought not to be monopolized in rolling-mills because adopted to swing heated metal from a furnace to one machine instead of to another.

Mr. Justice MACARTUUR delivered the opinion of the court :

This is an appeal from the decision of the Commissioner of Patents rejecting one of the claims accompanying the application of Joseph L. Pennock for a patent filed October 23, 1871. The invention relates to an improvement in conveying the heavy heated masses of iron from the bed of a furnace to the rolls of a rolling-mill.

The means employed in this process consist of a power-driven hauling mechanism with a chain, one end of which is secured to a shaft parallel with the rolls, and turned by the machinery which turned the rolls ; the other end of the chain is furnished with grappling-hooks for seizing the pile before it leaves the furnace, and between the latter and the rolls there is a swinging crane from which a platform is suspended. When it is required to remove the heated pile to the rolls the hooks attached to the chain are first adjusted over the pile nearest the doorway of the furnace, and then by starting the shaft the chain is caused to draw the pile on to the platform of the crane, which is swung around, and the fagot at once presented to the rolls. The plan and details of the combination are shown in a drawing filed with the specifications. The claim which has been rejected reads as follows :

“In a rolling-mill, the revolving shaft with its drum-chain and grapple, or any equivalent power-driven hauling mechanism, in combination with a crane, arranged and operating in connection with the said mechanism to receive the fagot from the same and deliver it at the rolls.”

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Prior to this invention the manner in which the fagot was transferred was by means of a truck or carriage which received it when withdrawn from the furnace, and it was then dragged by ten or a dozen men, stationed on each side, to the rolls. The number of men necessary for this purpose would of course depend upon the magnitude of the manufacture. Accompanying the argument of counsel for appellant is a picture illustrating the rolling of armor-plates at the Atlas Works in Sheffield, England, in which a body of forty men are seen dragging the loaded truck toward the rolls; and at the establishment of C. E. Pennock & Co., of which the patentee is one of the partners, it required the assistance of from ten to fifteen men to perform the same operation. But by substituting the crane and platform in place of the truck, two men can easily accomplish the same thing. Perhaps few devices in modern times have introduced a greater saving of time and labor into any branch of the manufacture of metals, and an invention possessing such a principle of economy will undoubtedly supersede, at no distant day, the laborious method of conveying heated masses of iron upon trucks by the unaided strength of men. I assume that the improvement introduces this advantage to economize, as the proofs appear to be clear, and are neither denied nor impeached. Now, it is a familiar principle that where known elements are combined in a new form, so as to produce a new and useful result, it is an invention, and as such is entitled to the protection of the patent-law. Judged of by this test, can there be any doubt of the patentable merit of this combination? The hard work of a large number of attendants is dispensed with by a cheaper and better power than manual labor. A substantial effect of this kind is peculiarly within the encouragement and favor of the law.

In his written opinion the learned Commissioner remarks that the "applicant has substituted a crane for the truck in this case. But, as is well known, cranes are in common use for conveying heated piles to be forged and rolled;" and again he says, "I have no doubt the combination is legitimate, so far as the co-operation of the parts is concerned; but it only required the application of mechanical skill to produce it in the present state of the art."

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There is no doubt but that the crane and platform used by the patentee instead of the truck constitutes that part of the combination which produces the beneficial result. And it is equally true that a crane was well known long before; but there is no proof of reference to show that it had ever been used as an agent for swinging the fagot in a rolling-mill, in combination with a power-driven hauling mechanism and a suspended platform, until Pennock adapted it to that purpose. In the light of the proofs the Commissioner is manifestly mistaken in asserting its prior use in this connection. It had been employed in iron manufactories and even in rolling-mills, but in a different way and for a different purpose. The use of a crane to convey heated iron to trip-hammers is mentioned, and is, indeed suggestive, and yet the hint had never exercised a single mind among the hundreds of ingenious artisans who fill the workshops of Europe and America. In view of this consideration it would seem impossible to say that the invention was not original, or that it only required the ordinary skill of a mechanic to produce it. Inventions, like all other matters of inquiry, are subject to be judged of by practical results. A combination is not less an invention, although all the parts are well known, if the effect is a new or a better result, and it is the highest evidence possible of a patentable combination that it produces an article with a great economy of time and labor. In *Furbush vs. Cook*, (2 Fisher, 672,) Judge Curtis remarked:

“And it is a decisive evidence, though not the only evidence, that a new mode of operation has been introduced if the practical effect of the new combination is either a new effect or a materially better effect, or as good an effect more economically attained by means of the change made. A new improved or more economical effect attributable to the change made by the patentee in the mode of operating existing machinery proves that the change has introduced a new mode of operation which is the subject-matter of a patent; and when this is ascertained, it is not a legitimate subject of inquiry at what cost to the patentee it was made, nor does the validity of the patent depend on an opinion formed after the event respecting the ease or difficulty of attaining it.”

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The utility of this combination is brought within this principle of patent-law by the affidavit of James D. Stott, which is made an exhibit to the application. In it he says:

“So much difficulty was experienced in removing the heavy heated piles from the furnace to the rolls that Mr. J. L. Pennock adopted mechanical appliances for effecting this purpose. These consisted of power-driven hauling mechanism for seizing the pile in the furnace and dragging therefrom on to the platform of a crane, which was swung around so as to deliver the pile to the rolls. This mechanism worked admirably and is still in use. Prior to this invention it was the practice to drag the pile from the furnace on to a truck, and then to wheel the truck with its load to the rolls. This mode of removing a heavy pile to the rolls was a most laborious undertaking, and required the assistance of from ten to fifteen men. The invention of Mr. Pennock, however, rendered the operation a very easy one, but two men being required to operate it, and to perform the same duty which required ten to fifteen men to accomplish prior to the use of the invention. I have no interest in this application for patent.”

From this uncontradicted statement, it is clear that this is one of the many instances in which the application of machinery to a useful art has resulted in an extraordinary economy of labor. A machine is made to do the hard work of a dozen men with but little trouble or expense, and the references entirely fail to prove that the combination which accomplishes this result ever existed before. If it required but the ordinary skill of a mechanic to make the discovery, it is certainly wonderful that so great a utility had not previously been introduced. Furnaces, steam engines, turning-rollers, trip-hammers, cranes, and hauling mechanism, were familiar powers to all persons employed in these workshops, and yet none had conceived the happy thought of causing machinery to perform the drudgery of the men who dragged the truck. This was the conception of Pennock. He took the well-known crane which everybody had neglected and adapted it with a suspended platform to this new function. Even were it true that this required but a small amount of invention, that fact would be no valid objection to granting

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a patent when the advantages are confessedly so great. As pertinent to this view I cite the language of the author of the article on patents in the *Encyclopædia Britannica*, as follows:

“A small amount of invention is indeed sufficient to support a patent where the utility to be derived from the result is great. A small step in advance, a slight deviation from known processes, may have been apparently brought about by the exercise of little ingenuity; but if the improvement be manifest, either as saving time or labor, a patent in respect of it will stand. The mere omission of a step from some commonly-practiced process has been held sufficient to support a patent for a new method of manufacture; and how often do we see what appears to be a very trifling degree of novelty attended with very advantageous consequences, sometimes resulting in the entire revolution of a manufacture, or in a lowering of price appreciable in every pound of an article extensively used by the public.”

Now, if the testimony in this case is credible, the improvement is productive of a result in the highest degree useful. The swing of the crane will do more than the drudgery of a dozen laborers; and in an establishment as large as that at Sheffield, England, two men will accomplish more in conducting the enormous masses of red-hot iron to the rolls than twenty, or perhaps even forty, now do, by dragging it there.

Whether the inventive faculty has been exercised, is mostly a question of evidence, and is always to be considered in reference to the condition of the art, and the results accomplished, and where the combination is confessedly new and the benefit great, the presumption is strongly in its favor. It is not always safe to consider that there has been no invention because it appears obvious and simple, for simplicity is often the chief merit of a patent. Nor is it material whether Mr. Pennock spent much or little time in elaborating his enterprise. If the thought was original and can be employed with substantial advantage, it becomes a meritorious invention within the meaning of the patent-law.

It will be observed, as already stated, that the crane, with its platform so adjusted in arrangement with the hauling mechanism as to co-operate in transferring the fagot, is not

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only new, but it constitutes the object of the invention and accomplishes the desired purpose. This combination is legitimately covered by the first claim, and a majority of the court are of opinion that the appellant is entitled to have it included within the protection of his patent.

The decision of the Commissioner is reversed.

**ELIZABETH C. OULD ET AL. vs. WASHINGTON
HOSPITAL FOR FOUNDLINGS.**

AT LAW.—No. 11375.

- I. A will devised fourteen lots of ground in the city of Washington in trust "for a site for the erection of a Hospital for Foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by act of Congress, as well for such hospital, and upon such incorporation upon further trust to grant and convey said trust-estate to the institution so incorporated, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivors of them, or their successors in the trust; and if not so approved, then upon further trust to hold the said lots for the same purpose until a corporation shall be so created by act of Congress, and shall meet the approval of said trustees, &c., to whom full discretion is given in this behalf; and upon such approval in trust, to convey as aforesaid," &c. Held, that the devise was not void under the rule in regard to perpetuities, which has no application in case of a trust for charitable purposes, nor is the devise void on account of the uncertainty of its objects.
- II. The jurisdiction of the court over charitable trusts rests on ancient and well-settled grounds, independently of the statutes of 13 Elizabeth.
- III. As the trustees are invested with absolute discretion, if even Congress should fail to create a corporation, or one acceptable to the trustees, or if the grant to the future corporation should be void, the trustees would hold the property themselves for the same purpose, and might erect the hospital.
- IV. As the taxes, charges, and assessments, are directed to be paid by the executors out of the residue of the estate, it was contemplated that the corporation should be created during their life-time, and before the final settlement of the estate. The conveyance was therefore to be made within the period prescribed by the rule of perpetuities.

STATEMENT OF THE CASE.

This is an action of ejectment brought to recover possession of several lots or pieces of ground in the city of Washington, which the plaintiffs claim as heirs at law of Joshua Peirce, deceased, late of the District of Columbia.

The defendant claims title to said lots by virtue of a devise contained in the fourteenth item of the last will and testament of the said Peirce, set out in the statement.

The case was heard in the first instance at the general term upon the following agreed statement of facts:

It is admitted by the defendant, the Washington Hospital for Foundlings, in the above-entitled cause—

1st. That Joshua Peirce, late of the District of Columbia, died on the 11th day of April, A. D. 1869.

2d. That the said Joshua Peirce died seized of the real estate set forth and described in the plaintiffs' declaration.

3d. That the plaintiffs, Elizabeth C. Ould, Elizabeth C. Beardsley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbets, Abner C. P. Shoemaker, and Peirce Shoemaker, are the heirs at law and the only heirs at law of the said Joshua Peirce, deceased.

It is admitted on the part of the plaintiffs—

1st. That Joshua Peirce, on the 15th day of October, A. D. 1867, duly executed his last will and testament, commencing as follows:

“I, Joshua Peirce, of the county of Washington, District of Columbia, do make this my last will and testament, in manner and form following.”

That following this is a revocation of other wills, then provision for payment of debts, then several specific devises, and then the fourteenth item, of which the following is a copy:

“14th. I give, devise, and bequeath all those fourteen certain lots or pieces of ground, part of square numbered two hundred and seven, situated between R and S streets north, and 14th and 15th streets west, in the said city of Washington, in the District of Columbia; which lots are numbered from number twenty-four to number thirty-seven inclusive, on a certain plan of subdivision of the said square registered and recorded in the surveyor's office for the said city, in liber W. F., folio 211, and are situate on the east side of the said 15th street, at the distance of one hundred and sixty feet northward from the north side of the said R street north, containing together, in front on the said 15th street west, one hundred and thirty feet, and in depth eastward, between parallel

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lines, two hundred and ninety-four feet and a half inch, more or less, to Johnson avenue, (including in the said depth a twenty-feet-wide alley, laid out through the middle of the said lots,) to my friends William M. Shuster and William H. Claggett, both of the said city of Washington, and the survivor of them, and the heirs, executors, and administrators and assigns of such survivor, in trust, nevertheless, and to, for, and upon the uses, intents, and purposes following, that is to say: In trust to hold the said fourteen lots of ground, with the appurtenances, as and for a site for the erection of a hospital for foundlings to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated for the said purpose of the erection of a hospital, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust; and if not so approved, then upon further trust to hold the said lots and trust-estate for the same purpose until a corporation shall be so created by act of Congress which shall meet the approval of the said trustees, or the survivor or successors of them, to whom full discretion is given in this behalf; and upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and until such conveyance, I direct the taxes, charges, and assessments, and all necessary expense of, for, and upon the said lots, and every one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate."

That following this is a devise of the "rest, residue, and remainder" of the testator's estate, "real and personal, including his estate called Linnæan Hill," in trust to trustees for the use of the testator's wife's nephew, in tail, with a devise over.

2d. That on the 22d day of June, 1864, the said will was

fully proved and admitted to probate in the orphans' court of the District of Columbia.

3d. That on the 22d day of April, A. D. 1870, Congress passed an "act for incorporating a hospital for foundlings in the city of Washington," for the terms of which act reference is had to 16 United States Statutes at Large, page 92, and that on the fourth day of April, A. D. 1872, said Shuster and Claggett, trustees, conveyed the property described in the declaration to the defendant, the Washington Hospital for Foundlings, so incorporated in conformity with the directions of said will, the property being the same as described in the above devise.

It is hereby stipulated that, on the facts above admitted, this case may be certified to the supreme court of the District of Columbia, sitting in general term, for hearing in the first instance; and that if the said court shall hold that the said devise, in the said fourteenth item of the said will, is void, judgment shall be entered for the plaintiffs; but if the said court shall hold that the said devise is valid, judgment shall be entered for the defendant, and that neither party shall be considered hereby to have waived his right of appeal to the Supreme Court of the United States.

O. D. Barrett, for plaintiff, maintained—

That the said devise is void, as tending to create a perpetuity.

That it is void for uncertainty. That being void, the said lots vest in the plaintiffs as the heirs at law of the testator.

It is an executory devise. *Greenleaf's Cruise on Real Property*, vol. 3, title 38, chap. 17, sec. 1, and part of sec. 2; 2 *Redfield on Wills*, chap. 2, sec. 17, par. 7; *Williams on Real Property*, 290, 291; *Powell on Devises*, 250, 287; *Nightingale vs. Burrell*, 15 Pick., 104.

The devise is void, if by any possibility it might create a perpetuity. 1 Jar., 233; 2 *Redfield*, 571; *Williams on Real Property*, 294; *Greenleaf's Cruise on Real Property*, tit. 38, c. 17, sec. 23; *Everitt vs. Everitt*, 29 Barber, 118; *Stephens et al. vs. Evans, administratrix*, 30 Ind., 51; *Sears vs. Russell*, 6 Gray, p. 98; *Phelps vs. Pond*, 23 N. Y., 69; *Rose vs.*

Rose, decided in 1863, in the N. Y. court of appeals, 4 Kent, 272, n.; 1 Drury and Warren, 245—(4 Kent, 272, n.;) *Barnes vs. Barnes*, 3 Cranch, C. C. 269; *Brattle Square Church vs. Grant*, 3 Gray, 142; 4 Kent., 267; 1 Jarman on Wills, 221; 4 Cruise Dig., tit. 32, c. 24, sec. 18; *Nightingale vs. Burrell*, 15 Pickering, 111; *Cadel vs. Palmer*, 1 Clark and Finley, 372; 2 Atkinson on Conveyancing, (2d ed.,) 264; *Bacon vs. Proctor*, Turner & Russell, 31; *Mackworth vs. Hingman*, 2 Kean, 659; *Ker vs. Lord Dungannon*, 1 Drury and Warren, 509; *Commissioners of Charitable Donations vs. Baroness de Clifford*, 1 Drury and Warren, 245 to 253; Lewis on Perpetuities, 169; *Duke of Norfolk vs. Howard*, 1 Vern., 164; *Welch vs. Foster*, 12 Mass., 97.

The limit of time beyond which an executory devise cannot arise, counting from the death of the testator, is a life or lives in existence, and twenty-one years and nine months. But in case no lives are mentioned by the testator, then the time is fixed at twenty-one years. Williams on Real Estate, 301; 1 Jarman on Wills, 230.

We thus find that the devise in question is void, if, at the death of the testator, a possibility existed that it might not vest in the prescribed corporation within twenty-one years, or, at farthest, a life or lives in being, and twenty-one years.

Was there at that time such a possibility?

The devise is to trustees in fee defeasible on approval, which the said trustees, their survivor or his successors, might possibly make of a corporation which Congress might possibly create.

There is no limit to the time within which the corporation must be created by Congress; there is no limit to the time within which the corporation shall be approved after its creation by Congress, if ever created; and, finally, there is no limit to the time within which the possibly-approved possible corporation shall make provisions so that any foundling child could by possibility receive any of the benefits of the trust.

The devise is void for uncertainty.

The law of this District is that no devise which cannot be maintained on general principles of equity can be maintained by reason of its being a charity. A long and

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unbroken series of decisions in Maryland and the District of Columbia show this to be the law. *Lingan et al. vs. Carroll*, 3 Harris and Johnson, 333. decided in 1793; *Dashiell et al. vs. The Attorney-General*, 5 Harris and Johnson, 398; *Dashiell vs. The Attorney-General ex rel. the trustees of Hillsborough School*, 6 Harris and Johnson, 1; *Wilderman vs. Baltimore*, 8 Maryland, 551; *Board of Missions of the Presbyterian Church vs. White's Administrators*, tried in the Circuit Court of the United States for Maryland, 4 American Law Register, p. 531; *Meade and others vs. Beale and Latimer*, Campbell, 359.

These decisions, all uniform, extending through seventy-five years, determine what the law of Maryland and the District of Columbia is, if courts and time can determine anything; and, although a totally different construction of the common law applicable to this case may prevail in every other State, we cannot, under the decisions of the United States Supreme Court, go to the courts of other States for an interpretation of the law of real estate upon a point which for generations has been fixed and established by our own courts.

It has become a maxim in that court, in cases involving the law of real estate, always to follow the decisions of the courts of the State in which the cases arise, whenever those decisions for a long series of years have been uniform. *Polk's Lessee vs. Wendall et al.*, 9 Cranch, 98; *Shipp vs. Miller's Heirs*, 2 Wheat., 325; *Thatcher vs. Powell*, 6 Wheat., 127; *Gardner vs. Collins*, 2 Pet., 85; *Jackson vs. Chew*, 12 Wh., 153; *Blight's Lessee vs. Rochester*, 7 Wheat., 550; *Daly vs. James*, 8 Wheat., 535; *Suydam vs. Williamson*, 24 How., 427; *Beauregard vs. City of New Orleans*, 18 How., 497.

The devise being void, the lots in question vest in the plaintiffs, as heirs at law of the testator, and not in the residuary devisee. 1 Jar., 588; *Gravenor vs. Hallum*, Ambler, 643; *Baker vs. Hall*, 12 Ves., 496; *Gibbs vs. Rumsey*, 2 Ves. and Beames, 294; *Jones vs. Mitchell*, 1 Simons and Stuart, 290; *Collins vs. Wakeman*, 2 Ves., jr., 683; *Arnold vs. Chapman*, 1 Vesey's Cas., 108; *Tregonwell vs. Sydenham*, 3 Dow., 194; *Lingan vs. Carroll*, 3 Harris and McHenry, 333; *Barnes vs. Barnes*, 3 Cranch, C. C., 269; *Van Kleeck vs. Dutch Church of New York*, 20 Wendall, 457.

Walter S. Cox and J. M. Johnson, for defendants, contra.

Mr. Justice WYLIE delivered the opinion of the court :

This is an action of ejectment, brought by the plaintiffs, as heirs at law of Joshua Pierce, deceased, to recover certain lots of land in the city of Washington, now in the possession of the defendant, and claimed by it under the will of Mr. Pierce, and certified hither from the circuit court to be heard in the first instance.

The testator died on the 11th of April, 1869, having made his will, the 14th section of which is in the following terms. (See statement for same.)

The heirs of the testator claim that the devise of these fourteen lots is void, because, first, it attempts to create a perpetuity; and, second, that the objects of the devise are uncertain.

At the date of testator's death the "Washington Hospital for Foundlings" was not in existence, but has been incorporated since that event, by act of Congress, and received a deed for the property in controversy from the trustees named in the devise. But it is claimed by the plaintiffs that, no time having been limited by the will within which the act of incorporation should be passed by Congress, there was a possibility that Congress might never pass the required act; or, if it should do so, the passage of the law might be deferred to so remote a future as to be beyond the limit of any life or lives in being and twenty-one years afterward.

But the rule in regard to perpetuities, we think, has no application where the immediate gift is a trust for charitable purposes, although the time for its application may be indefinite.

In *Sinnett vs. Herbert*, L. R., 7 Ch., 240, the lord chancellor said: "As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney-General vs. Bishop of Chester*, 1 Bro. Ch., 444, is a complete answer. There was a sum of £1,000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the King's dominions in America.

There was no bishop in America. The sum, being only £1,000, was not very likely in itself to be sufficient to establish a bishop. Nothing could be more remote or less likely to happen within a reasonable period than the appropriation of that fund to that particular object. But the court did not direct any application of the fund according to the *cy pres* doctrine. It would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time, with liberty to apply, because it was not known whether any bishop would be established."

A case in its principal features much like the present was that of *Chamberlain vs. Broshett*, L. R., 8 Ch., 206. The testatrix, after stating that she did not confidently feel that her family would not spend her money on the vanities of the world, &c., gave personal estate to trustees, to make certain annual payments for charitable purposes, and then directed that, when and so soon as land should be given by any other person for that purpose, two alms-houses should be built, and the surplus appropriated in making allowances to the inmates; and the gift was held to be valid, as it was an immediate gift for charitable purposes, although the time of its application was indefinite.

In this case the rule was laid down by the lord chancellor in the following language: "If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument—*Attorney-General vs. Bishop of Chester*, 1 Bro. Ch., 444; *Henshro vs. Atkinson*, 3 Madd, 306, and *Sinnett vs. Herbert*, L. R., 7 Ch., 232, to which may be added *Attorney-General vs. Craven*, 21 Beav., 392—prove that such gift was valid, and that there was no resulting trust for the next kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all *except on the occurrence of events in their nature contingent and uncertain*. On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises. If it

is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*."

The doctrine declared by these authorities is this, as we understand it, that where there is a gift for charity it will be carried into effect by the courts unless upon its face, and certainly, it is opposed to some rule of law. If the gift be upon condition precedent and that condition have not taken place, the bequest is void. If it plainly and in terms is in violation of the rule against perpetuities, it is also void. But if, at the testator's death, there only be a possibility of the happening of a contingency by which the gift may be postponed beyond the period prescribed in the rule against perpetuities, but that contingency in fact has not happened, and from events which have already taken place cannot happen, the gift will be supported. Indeed, one branch of the rule against perpetuities has never had application to bequests in trust for charitable objects. Blackstone says "by perpetuities (or the settlement of an interest which shall go in the succession prescribed, without any power of alienation) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." Book 2, p. 173. And yet for purposes of charity trusts may be created which may forever retire the given property from the power of alienation and the uses of commerce. That was the case with Girard's will, 2 How., 127, and with McMicken's will, 24 How., 465. In this last case the devise was to the city of Cincinnati in trust forever for the purpose of building, establishing, and maintaining, as far as practicable, two colleges for the education of boys and girls. None of the property devised or which the city might at any time purchase for the benefit of the colleges could at any time be sold. Such a trust in other cases would have been in violation of the rule against perpetuities, but as to the charity it was valid. In 2 Story's Eq., sec. 1167, the author says: "Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy; yet where the legacy is to a charity, the court will consider charity as the substance, and in such case, and in such cases

only, if the mode pointed out fail, it will provide another mode by which the charity may take effect, but by which no other than charitable legacies can take. A still stronger case is that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain or to some future act the mode by which it is to be carried into effect, there the court of chancery, if no mode is pointed out, will, of itself, supply the defect and enforce the charity."

In respect to gifts for charity, therefore, there is no place in a court of equity for the application of the rule as to perpetuities unless it appear on the face of the will itself that under no circumstances was it the intention of the testator that his bequest should operate till after the expiration of the time prescribed by the rule.

But it may be said that these doctrines are those only of the English chancery; that they depend upon the statute of the 43d Eliz., which has never been in force in this District, or in the State of Maryland, of which this District was at one time a part.

It is quite true that the doctrine of *cy pres*, which was greatly enlarged and developed in England under that statute, has never been followed here, except to the extent of carrying into effect the intent of the testator. That doctrine, however, so far as it depends upon the statute of Elizabeth alone, is confined to cases in which no trust is interposed, or where there is no person *in esse* capable of taking, or where the charity is of an indefinite nature. In such cases, the doctrine is the offspring of the statute of Elizabeth, and is not a doctrine to be applied in our courts. But where there is a trust, and the charity is defined, there is no need for any aid from the statute of Elizabeth; for the jurisdiction of the court vests on ancient and well-settled grounds independently of the statute. (See 2 Story Eq., section 1162.)

There probably never would have been any difficulty in the courts of this country in regard to questions of this character but for the decision of the Supreme Court of the United States in the case of the *Baptist Association vs. Hart's Executors*, 4 Wheat, 1. The correctness of that decision very soon began to be doubted. It was commented upon, without approval, though not with any distinct dissent, by the same

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court in the case of *Inglis vs. Trustees of Sailors' Snug Harbor*, 3 Peters, 113. In this case the bequest was sustained, though to an unincorporated society, and for purposes of a general character. In *Porter vs. Chapin*, 6 Paige's Ch., 649, Ch. Walworth says: "Although some doubt was thrown upon the question of charitable donations for the benefit of a community or body not incorporated, so as to be capable of taking and conveying the legal title to the property in that case, I believe it is generally admitted that the decision was wrong." This opinion of Chancellor Walworth is quoted with approbation by the supreme court of Massachusetts, in *Bartlett vs. Nye*, 4 Met., 879. The decision was evidently contrary also to the opinion of Chancellor Kent, as may be seen in the second volume of his Commentaries, 285. Since then, the doctrines of that case have been distinctly called in question by the Supreme Court of the United States, in *Vidal vs. Girard's Executors*, 2 How., 127, and in *Perin vs. Carey*, 24 How., 465, and the conclusion reached that charitable uses may be enforced in chancery under its general jurisdiction, independently of the statute of Elizabeth. The first of these two cases was from Pennsylvania, and the other from Ohio. In neither of these States was the statute of Elizabeth in force, although in both its principles are substantially administered as derived from the common law.

We have been referred to the case of *Dashiell vs. The Attorney-General*, 5 H. and J., 398, as authority showing that the statute of Elizabeth was never in force in Maryland, and consequently not in this District. That proposition may be admitted, and yet leave the jurisdiction of this court over the subject of charitable uses as complete and ample as that reported by the Supreme Court in the cases already referred to. The decision in that case was doubtless correct. It could not have been otherwise except under the *cy pres* jurisdiction, which no one pretends to exist in this court, except so far as allowed by the common law. The trust in that case was, that the trustees should appropriate the fund to the feeding, clothing, and educating the poor children belonging to a named congregation, *not such as the trustees might themselves select*, and without any power or right given the trustees to discriminate in the objects of the charity. It is distinctly sug-

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gested by the court that the decision would have been different had that right and power been vested in the trustees, for then the subjects of the bounty would have been ascertained and certain.

It is the only case on the subject which we have found in the Maryland reports, and having been decided since this District became independent of that State, and in regard to a question as to the general jurisdiction of chancery and not upon the construction of a local statute, is entitled to no greater respect in this District than the decision of that court upon any other subject; that is, it is entitled to respectful consideration, but is not obligatory.

We conclude, therefore, that the devise in question in the present case is void neither on the ground of perpetuity nor for the uncertainty of its object.

But another aspect of the case is presented on the construction to be given to the language of the devise. The trustees are, in the first place, to hold the property as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated, &c. But there is a proviso to this devise which it is important to examine. The testator foresaw that the society so incorporated might not be acceptable to the trustees. In that event he declares his wish to be that the trustees should themselves hold the property for the same purpose, that is, as a site for a foundling hospital, until a corporation was created by Congress which should meet their approval; and he gives the trustees absolute discretion on this subject. If, therefore, Congress should fail to create a corporation for the purpose, or one acceptable to the trustees, or if the grant to the future corporation should be void on the ground that no time was specified within which it was to take effect, the only consequence would be that the trustees themselves would hold the property for the same purpose, and might proceed to erect the hospital. In no event was there to be a resulting trust for the heirs.

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The proviso contains this further direction, that the taxes, charges, and assessments which might be levied upon the property previous to the making of the conveyance to the future corporation, should all be paid by his executors out of the residue of the estate. The corporation contemplated was, therefore, to be created during the life-time of those executors, and before the final settlement of the estate. It was not in the testator's power to incumber the residue of his estate with these charges beyond the period prescribed by the rule of perpetuities. The conveyance was to be made, therefore, within that limit, and it could be made only after the corporation was created.

Hence, it is seen from an exact interpretation of this devise that it was made in favor of a corporation which should be created by Congress within the period permitted by the law for the vesting of an executory devise in the ordinary case of an individual.

We are of opinion, therefore, that the devise in question is valid, and that judgment be for the defendant under the stipulation filed in the case.

SANBORN & KING vs. PATRICK O'DONNOGHUE
ET AL.

IN EQUITY.—No. 2784.

- I. Where a bill is filed to compel the defendant to perform a written memorandum for the sale of real property, and the defendant denies that he executed the alleged memorandum, but admits that the signature thereto is his, and the grantee who has assigned all his interest to other parties, who, in turn, have assigned to the complainant, denies that he ever purchased or agreed to purchase the premises, but admits that the agreement is in his handwriting and that the defendants signed it; and the same is corroborated by other circumstances, the law attaches a force to the writing which the evidence of the parties cannot overthrow, and the contract for the sale will be recognized and enforced.
- II. The defendant, after making the memorandum, executed a deed of trust on the premises to secure the payment of the sum of \$4,000, and the trustee is a party to the suit, the complainants were decreed to bring the purchase-money into court to be applied, in the first instance, to the extinguishment of the trust-deed, and that defendant receive the balance, and that he execute a conveyance of the property.

The case is stated in the opinion of the court.

M. Thompson for complainant.

R. T. Merrick and *M. F. Morris* for defendants.

Mr. Justice HUMPHREYS delivered the opinion of the court :

This cause was certified from the equity branch of the court, to be heard in general term in the first instance.

The bill states that on the 30th of April, 1867, one Daniel Pfeil, of Washington, District of Columbia, rented and leased from defendant Patrick O'Donnoghue, by indenture, for the full term of five years from the first day of May of that year, the lot of ground and premises situate in square numbered four hundred and fifty-four, fronting on Seventh street west,

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in Washington City. This allegation is admitted in the answer of O'Donnoghue.

The bill alleges that said Pfeil was to pay a yearly rent of two hundred and twenty dollars, in equal monthly payments, and to erect a building at a cost of not less than sixteen hundred dollars. The answer admits the payment of the rent up to the 30th of April, 1872, the full term of the lease, and also the erection of a building as provided in said indenture. The indenture of lease is exhibited. Said Pfeil took possession under said lease 1st of May, 1867, and he and his assigns have been in possession ever since.

The bill alleges that, on the 16th of May, 1867, the defendant O'Donnoghue and said Pfeil contracted for the sale and purchase of the said premises, at the end of the term of lease, for and at the sum of eight thousand dollars; five hundred dollars to be paid in cash, the balance, seven thousand five hundred dollars, to be paid on or before the expiration of said term of lease. This allegation of sale and purchase defendant O'Donnoghue positively denies in his answer.

Complainants produce a written memorandum, marked Exhibit No. 4, in the following words and figures:

“\$500.]

“WASHINGTON, *May* 16, 1867.

Received of Mr. Daniel Pfeil the sum of five hundred dollars, in part payment for lot on Seventh street, between G and H north, at \$8,000, sold to him.

PATRICK O'DONNOGHUE.”

The execution of this paper is denied by the defendant O'Donnoghue. In his deposition he says that he thinks the signature to the memorandum is his. But he does not know in whose handwriting the remainder of the paper is; and that he never saw the writing before it was shown to him by—he thinks—General Sanborn.

Pfeil says, in his deposition, that the handwriting of Exhibit 4 is his except “sold to him,” and the signature “Patrick O'Donnoghue,” and examiner's and notary public's memoranda, and that O'Donnoghue put the words “sold to him” in the writing. He says, in another part of his examination, that he does not know what words O'Donnoghue put in the said memorandum. This witness says that he put the figures

\$8,000 on the paper, but scratched them off, or made a mark through. He further says that he rented the premises, but he cannot tell what year; that the lease will show. The indenture recites that the yearly rent was two hundred and twenty dollars, payable monthly. This witness, in his deposition, says that he leased the premises for five years, and had to pay sixteen hundred dollars for the five years, five hundred dollars cash, leaving eleven hundred dollars rent. He was to pay monthly. He further says that he paid O'Donnoghue five hundred dollars in the beginning; that he supposes he took a receipt for it; that he "never, at any time, entered into an agreement with O'Donnoghue to purchase this property from him, and that there never was any agreement at any time, in writing or otherwise, that he was to have the property at eight thousand dollars at any time during his lease." In another part of his deposition this witness says he does not know what he put the \$8,000 in the receipt for.

Here we have the written indenture of lease and memorandum of the parties, the signatures to which are acknowledgments by each, and the statements of these parties in answer, and depositions casting and throwing confusion on the whole transaction. The law raises the question, What disposition is to be made of these writings and the conflicting statements of verbal assertions? The rule is well known and recognized. Several witnesses, other than the parties, were examined, and they all corroborate and sustain the writings exhibited. At the date of the lease and in connection therewith, witness Plant states that the purchase of the property was mentioned, and that the sum of \$8,000 was stated. Other witnesses prove the signatures of the parties, their acknowledgments of the same, and the law attaches a force to the writings in this case which the evidence fails to overturn, but, on the contrary, sustains and corroborates.

We conclude, therefore, that the evidence establishes a contract for the sale and purchase of the premises as set forth in the bill of complaint.

The written memoranda, signed by the parties, Pfeil and O'Donnoghue, are before us, and the testimony of those two persons, in their effort to attack the bona fides of the written instruments, fails to overthrow or to even weaken the force

which the law attaches, annexes, and fixes to a writing signed by the parties. And the testimony of every other witness, not connected with the matters in controversy, either directly or circumstantially, corroborates, upholds, and establishes the sale and purchase.

On the 10th of June, 1868, Daniel Pfeil sold and transferred all his right, title, and interest in the lease to Edwin B. Olmstead, of Washington City. On the 2d of December, 1868, the said Olmstead assigned the said indenture to the complainants. On the 10th of June, 1868, said Pfeil assigned his interest in the contract of sale and purchase to said Olmstead; and on the 4th of December, 1868, said Olmstead assigned his right, title, and interest in said purchase and sale to the complainants. These various assignments and transfers were acknowledged before notaries public, and recorded in the proper register's office in the city of Washington. Either Pfeil or complainants have had possession of the premises since May, 1867; rents were all paid up to April, 1872; and at the expiration of the term of lease, complainants tendered the sum of seven thousand five hundred dollars to said O'Donnoghue, and also prepared and requested him to sign a deed to and for the said described premises, which he declined and refused to do.

On the 7th of October, 1870, O'Donnoghue borrowed of defendant, McGuire, four thousand dollars, and executed a deed of trust to secure the same to defendant Merrick, trustee, on and upon the premises in controversy. Complainants bring into court, or propose so to do, the sum of seven thousand five hundred dollars, and pray that the same may be applied to the benefit of said O'Donnoghue in the extinguishment of the deed to Merrick, balance to him, and that the said deed to said trustee be canceled, and said O'Donnoghue be required to convey by deed a full title to complainants.

On payment into court of the money, we think the complainants will be entitled to the decree asked for, and counsel will carefully draught the same.

F. P. STANTON vs. J. O. C. HASKIN AND WIFE, G.
T. RAUB, AND A. J. ROGERS.

IN EQUITY.—No. 3259.

R. and S. were attorneys at law, and agreed to conduct a suit in chancery for the recovery of lands claimed by H. and wife, who agreed to give said attorneys one-third of whatever land or money might be recovered. A decree was obtained in favor of H. and wife for the lands, and also for the rents and profits. The attorneys received one-third of such rents in money, and bring this bill to enforce the execution of the agreement for an undivided third of the land so recovered. Held—

- I. That the common-law principle of champerty, as relaxed by modern decisions, is in force in the District of Columbia.
- II. That the agreement between R. and S. and the defendants, H. and wife, being for a part of the land in dispute, was a champertous contract, and therefore void.
- III. That contracts between attorneys and clients are carefully watched by the courts, and will be considered generally as a security for what the services are really worth.
- IV. That agreements between attorney and client, fairly made for contingent fees, will be sustained both in law and equity.

STATEMENT OF THE CASE.

The bill in this case is brought for the purpose of enforcing the specific performance of a contract, which is expressed in the following words:

“We have employed A. J. Rogers and F. P. Stanton to institute a suit in chancery for us against Wm. Durr, of Washington City, for the recovery of 78½ acres of land in Prince George’s County, Md., under a contract of said Durr with Jane Haskin dated 3d September, 1869. And we hereby agree and bind ourselves to give said attorneys, Rogers and Stanton, one-third part of whatever may be recovered from said Durr, whether the same be in land or money. We also authorize our said attorneys to compromise and settle the said controversy on such terms and conditions as to them may seem proper, and we hereby ratify and con-

Stanton vs. Haskin et al.

firm whatever they may do in the premises; and agree to pay them the amount above specified, whether the recovery shall be by suit or by compromise and settlement as herein authorized.

Witness our hands and seals, at Washington, D. C., on this the 7th day of May, 1872.

JANE E. HASKIN.

JAMES O. C. HASKIN."

"Witness:

JANE R. ELLIOTT,
EDWARD GRAVES."

It appears that, long previous to the foregoing agreement, the defendant, J. O. C. Haskin, purchased a tract of land lying in Prince George's County, Maryland, making a cash payment of \$2,000, and leaving the unpaid purchase-money secured on the land. Afterward, being unable to meet the deferred payments, he contracted with one William Durr for the latter to take the purchase off his hands, and received as consideration for his so doing, Durr's agreement in writing to convey to Mrs. Haskin a part of the tract, viz, 78½ acres, leaving 200 acres for Durr. In pursuance of this agreement, the county surveyor in the presence of the parties laid off the 78½ acres, and prepared a plat and certificate thereof. Haskin placed Durr in possession, he and the family thereupon removing to Washington City.

So matters rested for a year or so, Durr failing to convey the land as he had agreed to do, when the Haskins became anxious, and proceeded to take steps to compel his compliance. They first laid Durr's contract and the surveyor's plat before A. J. Rogers, a defendant in this suit, who in turn consulted the plaintiff, and the latter prepared the contract above set forth.

After the agreement was signed and delivered to complainant, he commenced a suit in chancery, as contemplated therein, to recover the 78½ acres of land for the benefit of the parties with whom he had made the agreement. That suit was prosecuted to a final decree ordering the conveyance, and directing that an account be taken of the rental value of the land while in Durr's possession, and this item was ascertained to be \$1,200. After the confirmation of the auditor's

report, Durr paid the complainant \$500 on account, and was allowed a stay of execution for the balance.

About this time Haskin and wife assigned to the defendant Raub, who was aware of their contract with Stanton, and Raub, in order to procure the complainant's order on Durr for the payment to himself of the two-thirds still due, paid complainant \$11.38, making in all the sum of \$511.38 received by Mr. Stanton, which, after indemnifying for the costs of suit which he had paid, left him one-third of the whole amount received. He now demands one-third of the land in addition, and the Haskins refusing to execute a deed, complainant has instituted this suit to enforce the agreement in that respect. Rogers has transferred his interest to Stanton, who is the sole complainant.

James W. Moore, for the complainant, cited—

Childs vs. Trist, ante, page 1; Washburn's Am. Com., Law, p. 212, sec. 88; *Strohecker vs. Hoffman*, 7 Harris, p. 227; *Ex-parte Plitt*, 2 Wall., C. C., p. 479.

James E. Williams, for defendants, contended that—

The contract sought to be enforced by the plaintiff is void for champerty. 1 Bac. Abr., Title Champerty, 575; 4 Kent's Com., 449, note b. "The case of *Berrien vs. McLane*, 1 Hoffman's Rep., 421, contains a strong declaration that every agreement made pending a litigation, to pay counsel or the attorney a part of the property to be recovered, is absolutely void. Not only every contract, but the actual transfer of part of the property in litigation, is illegal, on the ground of the relation of the parties and of the doctrine of champerty."—*Ibid.*

An attorney or solicitor is not permitted to contract with his client previous to the termination of the suit for a part of the subject-matter of the litigation as a compensation for his services. *Merritt vs. Lambert*, 10 Paige, 352, 358, and 2 Denio, 607; *Simpson vs. Lamb*, 7 Ellis & Black., 84, 92, 93; S. C., Am. L. Reg., vol. 1, N. S., p. 410, case of *Carpenter vs. Sixth Avenue Railroad Company*.

Dwight's notes on the last case, *ibid.*, p. 422, as follows:

"The lien of an attorney does not extend to a case where he has recovered in equity for his own client land from a defendant. *Smally vs. Clark*, 22 Vermont, 598. The allowance of such a doctrine would establish an equitable lien or mortgage in opposition to general principles. S. C., overruling a dictum in *Barnesby vs. Powell*, Ambler R., 102."

Mr. Justice MACARTHUR delivered the opinion of the court:

The principal ground on which the case is defended is, that the agreement set up in the bill is champertous and void. In the case of *Stanley vs. Jones*, 7 Bing., 349, Chief-Justice Tindall defines champerty to be the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute. This is the generally-received meaning of champerty in this country as well as in England. *Thalimer vs. Brinkerhoff*, 20 Johns, 386; 9 Met., 489; 18 Ind., 117. Now, by the terms of the contract, Stanton and Rogers undertook to prosecute a suit in chancery against one William Durr, for the recovery of 78½ acres of land, upon an agreement to receive one-third of whatever might be recovered in land or money, and Stanton now claims an undivided third of the property.

The strictness which formerly prevailed in the common-law doctrine of champerty has been considerably relaxed by modern decisions. An action can now be maintained in most, if not all, of the States of the Union for contingent fees. This court has recently decided in favor of a contract for a contingent fee in prosecuting successfully a private claim against the United States, where the services were to be rendered in a fair and open presentation of the facts, and where no secret or corrupt means were employed to mislead or deceive the legislative body. *Child vs. Trist*, *ante*, page 1.

So relations by blood, and all parties having an interest in the property, however contingent that interest may be, can lawfully maintain each other in actions concerning the land sought to be recovered. With these, and perhaps some other modifications, the common law with regard to cham-

perty, which is supposed to be founded on the statute of 28 Edward I, is generally recognized, except where it has been abolished by legislative enactment. It was the law in Maryland in 1801, and has never been abrogated in this jurisdiction. We must, therefore, hold that, with the qualifications established by modern decisions, the principle prevails in this District. That the contract here, so far as relates to the land in controversy, is affected by champerty at common law, no one can doubt; and, notwithstanding the law is rendered more rational by modern decisions, yet no court of equity has gone the length of enforcing the specific performance of an agreement for part of the land in dispute. While the principle of champerty remains a substantive part of our law, it is clearly our duty to enforce it.

We also think another settled principle is applicable to this case. It is, that all contracts between attorney and client, by which the former gains any advantage, are to be regarded simply as security for whatever he may have advanced or for what his services are worth. Some of the authorities hold that the burden of proving the fairness of such contracts is upon the solicitor, and they are to be regarded with suspicion, and with a presumption that they are unfair. *Evans vs. Ellis*, 5 Denio, 640; 6 Ves., 277; *Newman vs. Payne*, 2 Ves., p. 199; *Mott vs. Harrington*, 12 Vt., 199; *Berrien vs. McLane*, 1 Hoff. Ch., 421; *Wheelan vs. Wheelan*, 3 Conn., 537; *Starr vs. Vanderheyden*, 9 Johns., 253; 3 Ves., 740. We doubt the justness of these rules in the present condition of the profession, and we think lawyers may be trusted to provide for their compensation according to the fund that may be collected or recovered by their skill and diligence in conducting an important and valuable claim. All agreements made for mere contingent compensation are generally meritorious, and should be enforced. The most respectable counsel conduct immense litigations with no other hope of reward. But in this case there is an effort to recover land, not as a measure of compensation, but as a part of the very property in controversy. There is nothing in the evidence to induce a belief that there was any intrinsic difficulty in the case against Durr, or that its prosecution required great diligence or ability. It appears to have been

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comparatively free from hazard or uncertainty. In view of these facts, we think the complainant has been compensated for his services, and is not entitled, under established principles, to any benefit from the security set out in his bill.

It appears from the testimony that Haskin and wife consulted with Rogers; that they laid the surveyor's plat of the lands in dispute before him, and that Rogers, in turn, consulted with the complainant. The contract was then prepared by complainant himself, reciting the fact of their having been retained in the following words: "We have employed A. J. Rogers and F. P. Stanton to institute a suit in chancery for us against William Durr." By preparing and accepting this agreement we think the complainant is concluded as to the nature of his relations, being attorney to Haskin and wife. It is in that capacity they were consulted, and by becoming a party to this agreement they admit their previous employment.

We do not discover by the proofs in this case anything which will justify the imputation that the complainant, who is a highly-esteemed member of the bar, used any undue influence with Haskin and wife to enter into this contract, and there is nothing in the circumstances attending its execution from which we can infer that they were surprised into it by any influence or device of his. Still, upon the principles already announced, the decree dismissing the bill must be affirmed.

**COLUMBUS ALEXANDER vs. RICHARD H. WILLET
AND FRANK LIBBEY, COMPOSING THE FIRM
OF WILLET & LIBBEY.**

AT LAW.—No. 11686.

A demurrer which sets up matter of proof which would be a defense on the merits, is irregular in form and will be set aside.

STATEMENT OF THE CASE.

This is assumpsit upon a promissory note for \$1,600, dated February 28, 1873, indorsed by the defendants to the plaintiff. The declaration contains two counts. The defendant, Richard H. Willet, plead in bar that, before the commencement of this suit, to wit, on the 8th day of November, A. D. 1873, the said plaintiff, Columbus Alexander, for the recovery of the same amount of money now claimed in his said declaration, in an action instituted in this very court by F. A. Alexander, his, the said plaintiff's, then attorney, impleaded this defendant, together with Frank Libbey, the other defendant in said declaration named, touching the same identical claim and supposed cause or causes of action in said declaration mentioned, and such proceedings were thereupon had in said court in that action, that afterward and before the commencement of the present suit now in this court here between the said plaintiff and this defendant, to wit, on the tenth day of December, A. D. 1873, it was considered in and by the said court that the said plaintiff should take nothing by his said action in that behalf, and that the defendants might go thereof without day, as by the records and proceedings thereof in the said court appears; which judgment still remains in said court in full force, vigor, and effect, not reversed, annulled, or made void.

The plea then avers the identity of the parties and of the causes of action in both suits.

The plaintiff demurred to the plea and annexed the marginal memorandum, as follows:

Alexander vs. Willet et al.

One of the matters of law relied upon by plaintiff in interposing the above demurrer is—

That the action at law referred to by said defendants as a bar to this suit impleads different parties than the ones impleaded in this action, and plaintiff reads to the court the files and records in the office of the clerk of this court as evidence thereof.

And for another matter of law relied upon, the plaintiff says—

That the action at law referred to as a bar by the defendant as above stated was, before the commencement of this action, dismissed without prejudice, &c., and plaintiff reads to the court the records of said court as evidence thereof.

There was joinder in demurrer, and an order sustaining it was made in the court below, from which an appeal is taken to the general term.

Alexander and Hine for plaintiff.

Appleby and Edmonston for defendant.

By the COURT :

Without determining whether the judgment set up in the plea would be a bar to the present action, we are of opinion that the matters stated in the marginal note are subject of proof and should be asserted by way of replication and not by demurrer. The objection to the irregular form of the latter is well taken, and the order sustaining it must be reversed.

AMHERST H. WILDER vs. WILLIAM WELSH.

AT LAW.—No. 12261. •

The privilege of a witness in attendance upon a congressional committee is not higher than that of a member of Congress; he may, therefore, be served with a summons as defendant in a suit commenced in this court.

This was a motion to set aside the service of a summons upon the ground that the defendant in the suit, when the service was made upon him, was a witness from one of the States in attendance upon a congressional committee under a subpoena; and was, therefore, exempt from process while in attendance, and in coming and returning from the city. The court unanimously held that the privilege of a witness before Congress, or before any of its committees, stands on the same footing as the privilege of the members of that body, and that this does not extend to freedom from the service of a simple summons but only from arrest. As no privilege had been violated, the motion was overruled.

R. S. Hale, of New York, and *R. D. Mussey* for plaintiff.

Walter D. Davidge for defendant.

ANN JOYCE vs. WILLIAM H. WILKENNING.

IN EQUITY.—No. 3471.

- I. A landlord can claim the lien conferred by the act of Congress of February 22, 1867, for rent due and in arrear, and also for any installment of rent, although the tenant has occupied the premises only for a part of the time during which said installment is accruing.
- II. Where the lease is for a period of several years, and the rent is payable monthly, and the tenant is about to remove his goods and chattels from the leased premises, the landlord may issue his attachment under said act, and serve it on said chattels for rent in arrear, and for rent which will be due and payable for the month during a part of which the tenant occupied the premises.
- III. The lease was for a term of five years, at the annual rent of \$1,200 payable in monthly installments of \$100. The tenant threatened to quit the premises after being in possession a few months, having paid all the rent due for the portion of time he occupied the premises, and it was held that a bill in equity to enforce the landlord's lien by attaching all the goods and chattels of the tenant in order to secure or pay the whole of the rent for the entire term of the lease, could not be maintained.

The case is stated in the opinion of the court.

John C. Wilson, for plaintiff, filed a brief, from which the following points are selected :

This is a proceeding to enforce a lien for rent under the provisions of the act of Congress of February 22, 1867.

The plaintiff will maintain—

1. That by the removal of the defendant's goods and merchandise into the demised premises, the plaintiff acquired a lien upon such of them as were subject to execution for debt for the whole rent which the defendant had bound himself to pay. Act of February 22, 1867, sec. 12, 14 Statutes, p. 404.

2. That defendant by executing the lease bound himself to pay rent for five years from May 1, 1873, unless the premises should during that time become unfit for occupancy by reason of fire or other inevitable accident; and no matter

Joyce vs. Wilkenning.

what damage resulted to the property from causes other than those enumerated, the liability of the defendant on his contract could be in no manner affected by it. The fact that the streets in front of the premises were cut down by the board of public works and the property thereby rendered less valuable, or even untenable, does not discharge him from his contract; the act of the board of public works being neither a fire nor an inevitable accident. *Holtzapffel vs. Baker*, 18 Ves., 115; *Archer vs. Pullen*, 10 M. and W., 321; *Wagner vs. White*, 4 Har. & J., 564; *Hallet vs. Wylie*, 3 Johns., 44; *Gates vs. Green*, 4 Paige, 355; *Fowler vs. Bott*, 6 Mass., 63; *Jones vs. Dermott*, 2 Wall., p. 1; *Mills vs. Baer's Exr.*, 24 Wend., 254; *Jones on Bailments*, 104; *Story on Bailments*, sec. 25; *Fish vs. Chapman & Ross*, 2 Kelly's (Ga.) Reps., 349.

3. That the attachment provided by the act of Congress above referred to for the enforcement of the lien is co-extensive with the lien, and when obtained on a proper affidavit for rent not due it extends to the whole rent which the lessee has covenanted to pay.

Henry W. Garnett contra.

Mr. Justice OLIN stated the case, and delivered the opinion of the court:

A bill in equity was filed in this case to enforce a landlord's lien.

The bill sets forth in substance that the complainant, on or about the 1st day of May, 1873, executed a lease in writing of certain real estate and premises described in said lease to the defendant, for the period of five years from the 1st of May, 1873, for the consideration of the yearly rent of twelve hundred dollars, to be paid by the defendant in equal installments on the last day of every month during the term. That the defendant took possession of said premises on or about the 1st of May, 1873, and has continued to occupy the same up to the time of the filing of the present bill.

The plaintiff further states in her bill that the defendant is about to remove all his goods and merchandise from said

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store, having so declared his intention to her, and is at this date, October 29, 1873, actually engaged in the removal of such goods and merchandise, thereby tending to defeat the lien of the plaintiff upon said goods and merchandise *for rent to become due hereafter*. That the rent to become due, during the unexpired term of the said lease, will, as the plaintiff claims, amount to the sum of \$5,400, which amount the defendant has bound himself to pay in the manner above specified.

The plaintiff then prays that the defendant be ordered and decreed to pay the monthly installments of rent during the balance of his term as the same shall become due.

2d. That an attachment may be issued and laid upon the goods and merchandise of the defendant, subject to the lien of the plaintiff, for the amount of rent due and to become due between the time of filing this bill and the expiration of the defendant's term.

3d. That she may have such other and further relief as the court of equity can grant.

To this bill an answer was interposed which admits the execution of the lease set forth in said bill, and also of taking possession of the premises as alleged in the bill, in pursuance of the terms of the lease.

The answer then proceeds to state that on or about the 1st of November, 1873, the defendant removed his goods and merchandise from the said premises and vacated the same; and further says that "before doing so I gave the plaintiff notice of my intention so to do, at the same time informing her that the said store and premises had become and were entirely untenable. I further state that three months before I left the said store the board of public works of the city of Washington or District of Columbia commenced to excavate the street in front of said store, and did cut down said street several feet;" that during all the time the trade of the defendant was greatly injured, and fell off to such an extent as to entail upon him a daily loss, and that finally, when the sidewalks were cut down and destroyed, said store ceased to be accessible, and all trade ceased; that in this emergency the defendant applied to the plaintiff to do some-

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thing with the property to make it available, and she absolutely refused to do anything. And thereupon the defendant vacated the premises and removed his goods.

I have now, perhaps, stated all the facts necessary, in order to raise the question argued at much length before the court.

The question arising is as to the proper construction of the twelfth section of the act of Congress passed February 22, 1867, (see Statutes at Large, vol. 14, page 104.) Section 12 of the act is as follows:

“Be it further enacted, that the power claimed and exercised as of common right by every landlord of seizing by his own authority the personal chattels of his tenant for rent-arrear is hereby abolished, and instead of it the landlord shall have tacit lien upon such of the tenant’s personal chattels upon the premises as are subject to execution for debt, to commence with the tenancy, and continue for three months *after the rent is due*, and until the termination of any action for such rent brought within said three months. And this lien may be enforced—

1st. By attachment to be issued upon affidavit that the rent is due and unpaid, or, if not due, that the defendant is about to remove or sell all or some of said chattels; or—

2d. By judgment against the tenant and execution to be levied upon said chattels or any of them, in whosoever hands they may be found; or—

3d. By action against any purchaser of any of said chattels, with notice of the lien, in which action the plaintiff may have judgment for the value of the chattels purchased by the defendant, but not exceeding the rent-arrears and damages.”

The marginal note to the case of *Fowler vs. Rapley*, 15 Wallace, 328, states that “Under the landlord and tenant law, as regulated by the act of Congress of February 22, 1867, the ‘tacit lien’ given by the act upon certain of the tenant’s personal chattels, on the premises, attaches at the commencement of the tenancy to any such chattels then on the premises, and continues to attach to them in whosoever hands the chattels may come during the time allowed by the act for instituting proceedings, unless the lien is displaced by removal

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of the chattels, or by the sale of them in the ordinary course of mercantile transactions. It is not displaced by a sale of the stock in mass, while they (it) remain in mass, to a person who knew that the premises were leased, and continues to occupy them, selling in the ordinary way the goods, nor even by a second sale of that sort."

This note of the reporter gives a very imperfect idea of the point decided by the court. To enable that to be understood, I will quote from the opinion of Justice Clifford the material facts in the case, upon which the decision of the court seems to have been based:

Hall & Stackpole, on the 1st of July, 1867, rented a wharf of Rapley, to be used for ice-houses and for a lumber-yard, at the monthly rent of \$100. As lessees, they took possession of the premises, and carried on there the business of buying and selling lumber and ice until the 23d of November following, when they sold out their entire stock of lumber and ice to J. M. Perkins. Perkins took possession of the premises and the stock embraced in the sale, and continued the business until the 14th of the succeeding January, when he sold all that remained of the stock, and delivered the same to the plaintiff, Fowler.

At the time of the first sale, rent was due from the lessees from the 1st day of August of that year. On the 24th of January of the next year the lessor sued the lessees for rent in arrear, to wit, for one hundred dollars per month, for the months of August, September, November, and December of the previous year, and Rapley caused an attachment to be issued, in pursuance of section 12 of the act of Congress of 1867, to secure the payment of the rent then in arrear; that the property attached was a part of the stock which had belonged to Hall & Stackpole, and by them sold to Perkins, and by Perkins sold to the plaintiff, Fowler; and that this property had not been removed from the premises at the time of the serving of the attachment.

Upon this state of facts Fowler, the plaintiff, lessee of Perkins, who was the lessee of Hall & Stackpole, brings a suit of replevin against Rapley, and the marshal who executed the writ of attachment, to recover possession of the goods.

and chattels attached for rent in arrear and due at the time of issuing the writ of attachment.

It will be seen that upon this my statement of facts but two questions of law were necessarily involved in the case of *Fowler vs. Rapley* :

1. Did the assignment of the lease from Hall & Stackpole and a sale of the personal property in bulk upon the premises to Perkins, made at a time when rent was actually due and in arrear, and a similar transfer of the lease and stock in trade by Perkins to Fowler, divest the landlord (Rapley) of that "tacit lien" given him by the statute to secure the payment of his rent; and the court very properly held that such assignment of the lease and sale of the personal property in bulk did not divest the landlord's lien.

It may be observed in this case of *Fowler vs. Rapley* there was no evidence tending to prove that Rapley assented to any assignment of the lease from Hall & Stackpole to Perkins, or from the latter to Fowler, or that he accepted either of them as his tenants; and, further, that the attachment was issued for nothing beyond the rent actually due and in arrear at the time it was issued.

It will, therefore, be seen that the facts in the case of *Fowler vs. Rapley*, and consequently the decision of the court based thereon, afforded no aid to the solution of the question involved in the present case.

That question is this: If A rents to B a store and premises for a period of fifteen or twenty years, to be occupied for the sale of merchandise, agreeing to pay for the same an annual rent of \$1,200, payable in monthly installments of \$100 each, and gives notice to his landlord of his determination to quit and surrender the premises at some time before the expiration of the lease, having paid all the rent due or in arrear for any portion of the time he has occupied the premises, may he be proceeded against by attachment served on goods, if sufficient can be found to pay all the rent to accrue during the continuance of the lease? Such a proceeding, to say the least of it, would be a most extraordinary and summary mode of enforcing the specific performance of a contract between landlord and tenant. It is vain to inquire what is to be done with all the property attached, sufficient, probably, to pay a rent of

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\$1,200 per annum for five or ten years. What is to become of the rented premises for the unexpired term? May the landlord re-enter when deserted by the tenant, or rent them again, or must the court take possession and rent the premises, and hold the proceeds for the benefit of the parties interested? The only embarrassment in this question arises out of the first provision of section 12, viz, the landlord may enforce his remedy by attachment, to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all or some of said chattels.

It will be seen that, by the strict letter of this provision, if the tenant in this case was selling, or proposing to sell any or all of the goods upon the premises subject to execution, an attachment might be issued against him for selling any part of such goods. This, to say the least of it, is a very singular provision in reference to renting of premises which were rented for the sole purpose of using the house and premises as a retail shop of merchandise; for upon this construction of the act the sale of one article from his shop would work a forfeiture of his lease, at the option of the landlord.

We think the language of this most extraordinary statute for the relief of tenants against the arbitrary process of distress by the landlord may be satisfied by holding that the landlord may issue an attachment for any rent due and in arrear; and may also issue an attachment in cases where the tenant has occupied the premises for some part of the time, during which an installment of rent accrues. For instance, if the rent is payable monthly, and the tenant threatens to remove all his goods or chattels from the premises, the landlord may issue an attachment for the rent that has accrued and which will become due and payable on the day appointed in the lease for its payment.

The decree dismissing the bill entered at the special term by Justice WYLIE is affirmed.

REPORT OF CASES

DECIDED BY

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,

AT SEPTEMBER GENERAL TERM, 1874.

[Mr. Justice Humphreys was absent this term holding the Criminal Court.]

JOHN A. BARBER vs. SAMUEL STRONG ET AL.

AT LAW—No. 3561.

- I. S. agreed that D. D. and B. should negotiate certain certificates, to become due him from the board of public works, so far as he might require; and it was held that the amount of certificates to be disposed of depended upon his discretion, and he could not, therefore, be enjoined from receiving them himself.
- II. S. gave D. and B., two of the parties to the above agreement, a power of attorney to receive all certificates due him from said board of public works, and it was considered that the two instruments ought to be construed as one, and that S. had, therefore, the same right to receive the certificates himself, should he so require, instead of the attorneys.
- III. The complainant alleges that he became surety on the bond of S. in consideration of an agreement that the power of attorney was to be held as his indemnity. The answer denies such agreement, and, there being no proof to sustain it, the injunction was properly refused.
- IV. No liability can ever arise on complainant's suretyship, if S. fulfills the contract for the performance of which the bond was given.—WYLIE, J.
- V. A preliminary injunction is not a final order or decree, and is, therefore, not appealable.—OLIN, J.
- VI. The power of attorney has a different object from the contract, and, the parties not all being the same, the two instruments do not constitute one agreement; there is consequently a misjoinder of parties defendant in the bill, and for that reason it is incapable of sustaining an injunction.—MACARTHUR, J.

STATEMENT OF THE CASE.

The bill alleges that the defendant Strong contracted with the board of public works of the District of Columbia to construct a sewer and to do certain work in Georgetown, in said District; and that, for the purpose of enabling him to carry on said work, he entered into an agreement with complainant and the defendants Dodge & Darneille, of which the following is a copy :

“Memorandum of an agreement made and entered into by and between Samuel Strong, of the first part, and Messrs. Dodge & Darneille and John A. Barber, of the second part. The said Dodge, Darneille, and John A. Barber, for the consideration hereinafter mentioned, hereby agree to negotiate for the said party of the first part all the bonds, certificates of indebtedness, or vouchers issued by the board of public works to him, (so far as it may be necessary and required by said Strong,) and to furnish to said Strong as much money as may be necessary to pay for the labor and materials necessary to enable said Strong to complete and carry out his subsisting and unfinished contract with the board of public works to construct a sewer along Boundary street and ——— Creek to the eastern branch of the Potomac; and the said Strong, in consideration of the said services, hereby agrees to furnish to said parties of the second part sufficient certificates, vouchers, or bonds of the board of public works upon which to raise the said money to carry on said work; and said Strong further agrees hereby to pay to said parties of the second part the sum of six thousand dollars, (\$6,000,) to be paid in eight-per-cent. bonds of the board of public works, at their par value, as follows, to wit, viz: Two thousand dollars (\$2,000) at the end of five weeks from this date, two thousand dollars (\$2,000) at the end of ten weeks, and two thousand dollars (\$2,000) at the end of fifteen weeks from this date; provided, however, that if said sewer shall not be completed within fifteen weeks the said last-mentioned payment shall not be due or demandable until said sewer shall have been fully completed. It is further mutually agreed and understood that said parties of the second part shall not pay for loans for said Strong more than

the legal rates of interest
Strong first had thereto.

In witness whereof we ha
9th day of August, 1873.

The bill then alleges th
agreement, the defendant S
the plaintiff his attorneys, t
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or to become due, to him, S
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aforesaid; and "to, from
evidence necessary, or tha
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any loss on account of said
December following, Stron
a revocation of the power
gave notice to complainant
that they would not recogni
That thereupon complainan
that they were interested
was still in force, and was c

The bill charges that the
certificates and other vouch
been assigned to the compla
inflicting irreparable dama

Prayer for injunction and

Strong, in his answer, ac
denies that it is coupled wi

neille, and he had a right to revoke it. He admits that complainant became surety on his bond, but denies that he agreed that the power of attorney was to be held as an indemnity for his suretyship; and avers that nothing was said, when the complainant consented to go on the bond, about the power of attorney, and that the same was signed without the suggestion of security. He admits he revoked the power of attorney, and that the board aforesaid recognizes the validity of the revocation, and have refused and now refuse to recognize said Barber and Darneille as his attorneys. He is informed and believes the plaintiff served his notice on the said board. He denies their interest in the power, or in the certificates and vouchers therein referred to, and says it is not true either of them can be injured by said revocation.

Barber

his discretion, and is to be think the power of attorney tract, and as Strong has re to have no more certificates he cannot be enjoined from ever he chooses he can stop and he can also stop the a part of the contract.

The bill states that Barber bond to the board of public the power of attorney shall against all loss by reason of but the answer denies this not otherwise proved. I deny the proofs, an injunction cannot

The order denying it ought

WYLIE, J.:

Another ground for refusal has never been called upon reason of his undertaking is enforced against him if Strong board of public works. If he has notified the board attorney, and that it has never arise, for he would be the undertaking in his bond certificate which the board

OLIN, J.:

The motion in this case ing the equity of the bill would lie. But I am further in this case was not appropriate confines the right of appeal involve the merits of the not the final determination decree must be final in order ever, for affirming the order

MACARTHUR, J. :

I concur in the decision that the order appealed from ought to be affirmed. I think, however, it should be affirmed for the reason that there is a misjoinder of parties defendant in the bill. The answer makes this objection, and in my view it is fatal to the bill. I cannot agree to the view that the contract and power of attorney constitute but one agreement. Strong made the contract with Dodge, Darneille, and Barber, but the power of attorney is given to only two of these parties. The rule which permits separate instruments to be read together applies only when the parties are the same and they relate to the same subject. Such is not the case here. The power of attorney has a different object from the contract, nor are all the parties the same, and there is no reference in one to the other on their face. The former cannot be construed to affect the rights of Dodge, who is not named in it, and who, as far as the case shows, has never waived his interest in the contract. I am satisfied that the portion of the answer which is interposed by way of demurrer is fatal to the maintenance of the bill, and the latter is, therefore, incapable of sustaining an injunction.

DISTRICT OF COLUMBIA vs. SAVILLE ET AL.

APPEAL FROM CRIMINAL COURT.

The act of the legislative assembly of the District of Columbia, passed June 23, A. D. 1873, and entitled "An act to regulate shows and exhibitions in the sale and disposal of seats," is a vexatious and unlawful interference with the rights of private property, and as such the legislative assembly was incompetent to enact it.

The facts appear in the opinion of the court.

Edwin L. Stanton for the District of Columbia :

The enactment by the legislative assembly, under which defendants are arraigned, is constitutional.

The power to regulate as well as to license occupations and amusements has repeatedly been conferred upon municipalities by State legislatures, repeatedly exercised, and always upheld by the courts. The power may be more liberally exercised in respect of public amusements and exhibitions than in the case of occupations. 1 Dillon on Municipal Corporations, sections 93, 291, 292 ; Cooley on Constitutional Limitations, 572.

The very enactment in question in this case, against the sale of reserved seats after the beginning of a theatrical performance, is drawn from a similar ordinance passed in the city of Cincinnati.

R. T. Merrick and *M. F. Morris* for defendants :

The right of property means the free, absolute, and uncontrolled right to use, enjoy, and dispose of property ; and the right of disposal is as absolute as that of use and enjoyment 1 Blackstone's Com., 138 ; 2 Kent's Com., 320, 326 ; Bouvier Law Dict., Title *Property* ; *Wynehamer vs. The People* N. Y., 396.

The restrictions upon the right, apart from those contained in revenue laws, which have always been held to

tional in their character, are reduced to the head of "police regulations," and may be summed up in the one maxim, "*Utere tuo ut alieno non lædas*;" "Use thine own in such manner that thou wilt not injure that of another."

Legislative restrictions on the rights of property are valid only when they are demanded for the protection of the public health, the public peace, the public safety, or the public morality. There is no pretense that the enactment in question is demanded by any one of these considerations; it is not claimed to have any such scope. It is a plain attempt of this legislative assembly to compel a man to use his property, not according to his own views, but according to the views of others; and it cannot be defended upon any ground of public policy. The practice complained of, and against which the act is directed, does not conflict with any public or private right, and is not therefore the rightful subject of legislation.

Mr. Justice OLIN stated the case, and delivered the opinion of the court:

This cause comes before us upon a certificate of the justice holding the criminal court, as is claimed under and in pursuance of the 5th section of the act of March 3, 1863, organizing the supreme court of this District. (See 12 U. S. Statutes at Large, p. 763.)

The facts in the case are these:

An information was filed in the police court of this District to enforce the provisions of an act of the legislative assembly of the District, passed June 23, 1873, entitled "An act to regulate shows and exhibitions *in the sale and disposal of seats*." The act is as follows:

"Be it enacted by the legislative assembly of the District of Columbia, That after opening for the reception or entertainment of persons attending any theatrical exhibition, public show, or amusement, of whatever name or nature, within the District of Columbia, for which money or other reward is in any manner demanded or received, it shall be unlawful for any person or persons to sell or dispose of, or to permit the sale or disposal of, such tickets or seats so as to

reserve particular seats in a theater, or exhibition to any individual, or reserved or taken, any seat reserved by the sale of tickets for such exhibition, show

The second section of the *framed*, and posted in some the theater, or other place o

The third section imposes more than \$10, for a violation

The offense, if any was committed, of the provisions of the first act as applied to the case before the court, is to this effect: No person, after the doors of such theater are opened to spectators, sell tickets so as to mark or describe as reserved seats not been reserved *by the sale* of the opening of such exhibition, that when the doors of the theater are opened to spectators, whoever occupies the same may plant himself in the way of the cover, unless the proprietor or manager he had selected had been so designated in the doors of the theater for the purpose at least before the commencement of the performance without reference to the fact that a ticket for twenty-five cents entitles the holder to a seat in the upper gallery, and that the most desirable seat in the lower

Indeed, if this law can
offense for the manager or
of his friends or patrons a f
by their presence and appi
entertainment.

He cannot, however, resort to the commencement of the action the proprietor or manager of his private box for himself and the penalty imposed in the third

District of Columbia vs. Saville et al.

The provisions of the act are attempted to be justified on the ground that it is a mere police regulation, and as such, within the competence of the late legislative assembly to enact. We are all of the opinion that the act has nothing whatever of the character of a police regulation, but on the contrary that it is an unwise, vexatious, and unlawful interference with the rights of private property.

The information filed in this case should be quashed.

JOHN J. SULLIVAN vs. M. PORTER SNELL, GEORGE BURGESS, JAMES M. ORMES, AND JACOB D. KITCH.

AT LAW.—No. 11092.

- I. A note for \$500, with interest at the rate of ten per cent., made for the accommodation of the indorsers, and negotiated to the plaintiff for \$460, who was the first holder for value, with notice of its character, was held to be usurious under the 3d section of the act of Congress of April 22, 1870, and that plaintiff could recover no more than the amount he paid for the note without interest.
- II. Under such statute, where the debtor has agreed in writing to pay interest exceeding six per cent. per annum but not greater than ten till the maturity of his obligation, but the contract is silent as to any rate of interest beyond that period in case the debtor should be in default, no more than interest at the rate of six per cent. per annum can be recovered for the time subsequent to the maturity of the obligation.

STATEMENT OF THE CASE.

This is a suit upon a promissory note, dated Washington, D. C., March 25, 1873, made by M. Porter Snell, payable to the order of George Burgess, ninety days after date, with interest at the rate of ten per cent. per annum, and indorsed by the defendants Burgess, Ormes, and Kitch.

The defendants plead, in substance, that the note was made by Snell and indorsed by the other defendants for the accommodation and benefit of Ormes; that neither Snell nor Burgess had any benefit from it; that only \$415 was paid as a consideration for the note at the time it was first passed for value, and that it was first negotiated for value to the plaintiff; on which pleas issue was joined, a trial had, and a verdict rendered in favor of plaintiff for \$460, with interest from March 25, 1873, at the rate of ten per cent. per annum.

On this trial, evidence was given for the defendants tending to prove that the note was made by the defendant Snell and indorsed by the defendant Burgess for the benefit of the accommodation of defendant Ormes; that neither Snell nor Burgess received any part of the proceeds, but

same was received by Ormes and Kitch; that the note was first passed for value to the plaintiff through one Clark, a broker, and that only \$415 was received upon it. And evidence was given on behalf of the plaintiff tending to show that said Clark brought the note to the plaintiff, stating that he had a good note which the parties wanted to raise money upon, and that the plaintiff said if the defendant Kitch would give him a writing that the note should be paid at maturity he would advance the money upon it, and that the plaintiff took the note at about its date and advanced \$460 for it.

The testimony being closed, the counsel for the defendants requested the court to instruct the jury that if they should find from the evidence that the first time the note was passed for value was when it was passed to the plaintiff, and that he advanced for it a less sum than the face of the note, then the plaintiff is only entitled to recover the amount which he advanced, without interest; which instruction the court refused to grant; to which ruling of the court the counsel for the defendants then and there excepted. The court then instructed the jury that the plaintiff was entitled to recover what he advanced for the note, with interest thereon from the date of the note at the rate of ten per cent. per annum; to which instruction the counsel for the defendants then and there excepted. The verdict was for the plaintiff.

Mr. McConnell for plaintiff.

L. G. Hine and *S. R. Bond*, for the defendants, made the following points:

1. By the usury law in force in this District prior to April 22, 1870, all "bonds, contracts, and assurances" for the payment of more than six per cent. interest were "utterly void."

On the date above given the act of Congress was passed allowing ten per cent. interest to be contracted for in writing, and providing that any person contracting to receive above that rate shall forfeit the whole interest contracted to be received, and shall be entitled only to recover the principal sum due.

To lend \$415 or \$460 and to drawing interest at the rate of t certainly usurious, and under the contract "utterly void," while under forfeits all interest and can receive, which is not the face of the

The instruction requested was first passed for value to the its face, it became tainted with us only recover the sum lent; which following, among numerous authorities, *Company*, 15 Johns., 43; *Sauerice* Gill, 477.

2. The note in question does not of ten per cent. per annum *until* the court caused the jury to render at that rate, not only from the date of maturity, but until the payment of

Mr. Justice WYLIE delivered the

It is manifest from the evidence in question was not what is termed a note made up by the maker and of being sold, and the proceeds of the indorsers. After it had thus into the hands of a broker, who considerable discount from the amount the purchaser having notice of its character payable ninety days after date, ten per cent. It was sold for \$4 taken out his commission the proceeds. The sale of the note, being its original purchaser who had a perfect knowledge therefore, usurious, at least to the discounted from its face. The act at Large, 91,) section 3, declares that no corporation in this District shall rate of interest than ten per cent. or six per cent. upon any verbal

poration shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation."

The ruling of the circuit court was that the plaintiff might recover the \$460 which he had paid for the note, together with interest at the rate of ten per cent. per annum to the day of payment. We think it clear that, under the provisions of the law just quoted, he was entitled to recover no more than the amount he paid for the note without interest.

There is another question presented upon the record, which, from its general interest, it may be proper not to pass over without notice, notwithstanding that the view we have taken of the other question would perhaps render such notice unnecessary.

The note in controversy was payable at ninety days, with interest at the rate of ten per cent. per annum. It was ruled by the court that the note carried the same rate of interest after maturity which it carried previous to that period.

This ruling we find to be in conflict with the decision of the Supreme Court of the United States, in *Brewster vs. Wakefield*, 22 How. R., 118. In the opinion of the court in that case Chief-Justice Taney says: "The question in controversy between the parties is whether, after day specified for the payment of the notes, the interest is to be calculated at the rates therein mentioned, or according to the rate established by law when there is no written contract on the subject between the parties. The question depends upon the construction of a statute of the Territory which is in the following words:

"SEC. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

"SEC. 2. When no rate is agreed upon or specified in a note or other contract, seven per cent. per annum shall be the legal rate." * * * *

"The written stipulation" (in that case) "as to interest" is interest from the date to the day specified for the payment. There is no stipulation in relation to interest after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and

was not given by law, in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And in this view of the subject we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. The cases of *Macomber vs. Durham*, 8 Wen., 550; *United States Bank vs. Chapin*, 9 Wen., 471; and *Ludwick vs. Huntsinger*, 5 W. and S., 51, 60, were decided upon this principle, and in the opinion of the court correctly decided."

The provisions contained in our statute of 22d April, 1870, already referred to, so far as relates to this question, are substantially the same as those quoted in the opinion of the Supreme Court, from the act of the Territory of Minnesota. The first two sections of our law are in these words:

"SEC. 1. That the rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as hereinafter provided.

"SEC. 2. That in all contracts hereafter to be made it shall be lawful for the parties to stipulate, or agree in writing, that the rate of ten per cent. per annum, or any less sum of interest, shall be taken and paid upon every one hundred dollars of money loaned, or in any manner due and owing from any person or corporation in this District."

We think, therefore, that in all cases under our law where the debtor has agreed in writing to pay interest exceeding six per cent. per annum, but not greater than ten, till the maturity of his obligation, but the contract is silent as to any rate of interest beyond that period, in case the debtor should be in fault, that no more than interest at the rate of six per cent. per annum can be recovered for the time subsequent to the maturity of the obligation.

The judgment must be reversed and new trial awarded.

FIRST NATIONAL BANK, USE OF STANTON, vs.
EDWARD ABNER.

AT LAW.—No. 6357.

- I. A plea that the defendant is a petitioner in bankruptcy does not, in itself, operate as a stay of proceedings.
- II. A judgment in such case was recorded by the plaintiff April 6, 1871, and an attachment issued thereon the 2d day of March, 1874. It was held that a motion to discharge such attachment on the ground that defendant had been adjudged a bankrupt came too late, the defendant having neglected to obtain a stay of proceedings, and having waited more than three years after the entry of the judgment.

STATEMENT OF THE CASE.

The plaintiff obtained judgment on the 6th day of April, 1871, for the amount of two notes described in the declaration. The record shows that the defendant filed three pleas, one of which was to the effect that he was a petitioner in bankruptcy, and that he had applied to be discharged on the equity side of this court. There was no replication to this plea, nor stay of proceedings ordered by the court.

On the 2d day of March, 1874, a writ of attachment was issued under the judgment, by virtue of which the credits of the defendant in the hands of C. E. Prentiss were attached, amounting to \$75.67.

On the 11th day of April, 1874, the defendant made this motion to discharge the attachment, on the ground that it was laid in disregard of a stay of proceedings.

The motion was overruled, and the defendant appeals to the general term.

Enoch Totten for plaintiff.

Fr. Schmidt for defendant.

CARTTER, Ch. J., delivered

We all think the motion is years since the entry of the neglected at the proper time

If the plea in bankruptcy and was not waived by the be clearly erroneous. But error would be by appeal or ing over three years, ask us aside on a motion.

Judgment affirmed.

SAMUEL FORD AND CHARLES H. HOLDEN vs.
DANIEL SMITH.

EQUITY.—No. 3284.

- I. A bill in equity can be filed to enforce a vendor's lien for the purchase-money of land sold and conveyed, only when the complainant has obtained a judgment at law for the amount due; or when he avers in his bill such facts as will show that he cannot have a full, complete, and adequate remedy at law.
- II. Where the answer sets up that there is no such averment in the bill, the court will entertain the question of jurisdiction at the hearing and dismiss the bill.
- III. This principle is peculiarly appropriate in a case where the existence of the debt is disputed, and the conflict of testimony leaves it doubtful whether there is anything due.

STATEMENT OF THE CASE.

The bill in this case is filed by complainants, who have sold and conveyed the property mentioned in the bill to defendant, to enforce a vendor's lien for purchase-money alleged to be unpaid.

The bill does not allege that the complainants have exhausted their remedy at law, or that the defendant is insolvent, or that the complainants have not a full, complete, and adequate remedy at law; nor does it set forth such facts as will show that they cannot have such remedy at law.

This objection to the bill is taken in the answer, and the same benefit asked for it as if it had been taken by way of demurrer.

The other facts necessary to understand the case are fully stated in the opinion of the court.

The bill was dismissed and the complainants appealed.

That portion of the briefs of counsel only is given which bears upon the point decided by the court.

J. D. McPherson and *I. H. Ford* for complainant:

The jurisdiction may be sustained on two grounds.

1. The vendor always has a lien for the unpaid purchase-

money, and liens can be enforced only in equity. There is authority for saying that he must first sue at law. But if that was an objection it should have been taken by demurrer. It is too late to take it at the hearing. When a defendant has answered and submitted himself to the jurisdiction of the court it is too late to insist that the plaintiff has remedy at law, unless the court of chancery is wholly incompetent to grant relief. *Grandin et al. vs. Lokey et al.*, 2 Paige, 509. In the Supreme Court, in *Oelrichs vs. Spain*, the court held that as it appeared the remedy at law would not be perfect, but that a suit in equity would still be necessary before final settlement, the suit might be brought at once, and sustained the jurisdiction on the ground of avoiding a multiplicity of suits. *Oelrichs vs. Spain*, 15 Wallace, 228. The complainants have a lien, or what Adams (Eq., p. 128) calls an equitable mortgage, upon the property. With this the law side of the court has nothing to do, and the complainants have no remedy, perfect or imperfect, at law.

Appleby & Edmonston for defendant :

The want of jurisdiction is fatal to the bill, and it ought to be dismissed. *Richardson vs. Stillinger*, 12 G. and J., 480; *Ridgeway vs. Thoran*, 2 Md. Chan. Dec., 303; *Botlorf vs. Conner*, 1 Blackford, 287. Where a different doctrine seems to have been maintained, it will be found that the bill in fact contained an equivalent allegation, or that the bill was filed by a vendor who had retained the title, the vendee having only a bond or an agreement for a conveyance. As in *Russell vs. Todd*, 7 Blackford, where there was an allegation that defendant had no other property, and had left the State; in *Roper vs. McCook & Robertson's Administrator*, 7 Ala., where there was only a bond to convey and the bill alleged that judgment had been recovered, and defendant had no other property by which payment could be coerced: in *High vs. Batte & Bradley*, 10 Yerger, 186, where there was an allegation of insolvency; in *Richardson vs. Baker*, 5 Marshall, 323, and *Galloway vs. Hamilton's Heirs*, 1 576, where there was only a bond to convey. The distinction in this respect between the lien of a ven-

Ford et al. vs. Smith.

conveyance and the interest or estate of the vendor under articles before conveyance. *Richardson vs. Stillinger, supra*; *Adams' Equity*, p. 277, note.

Mr. Justice WYLIE stated the case, and delivered the opinion of the court:

This is a suit brought by the complainants for the purpose of enforcing the vendor's lien for a part of the purchase-money claimed by them to be due from the defendant. The deed was for a house and lot in this city, and dated 23d November, 1871, and the consideration expressed was \$7,000, paid by the defendant. Defendant, by his answer, denies that any part of the consideration remains unpaid. The controversy has sprung from the following facts: Ford and Holden were partners engaged in erecting two blocks of houses for the purposes of sale, one on Second street east, and the other on Eleventh street west. Holden was at the same time, and had previously been, building other houses on his own account. Smith, the defendant, was a manufacturer of and dealer in doors, blinds, trimmings, &c., of which he had furnished a large amount, as well to Holden & Ford as to Holden individually, for which the parties were thus respectively indebted to him. A number of these houses being yet unfinished, and Smith objecting to furnish any more materials, either on account of the firm, or of Holden individually, the latter proposed that he should take one of the houses in the block on Eleventh street for \$7,000, the firm to complete the house; and the proposal was accepted by Smith. The amount of the purchase-money somewhat exceeded the aggregate indebtedness to Smith of both Ford & Holden and of Holden individually, though only to the extent of a few hundred dollars. It exceeded the amount of the firm's debt several thousand dollars. Smith was to renew the credit till the materials to be supplied should equal the amount he was to pay for the house. Accordingly, the deed was executed by both Ford and Holden and their respective wives, and delivered to Smith by the hand of Holden. The credit was renewed, and materials sold and delivered by Smith to the firm, and to Holden individually, until the amount of the two accounts together was equal to the purchase-money on

the houses, when Smith declined
ing that Ford and Holden had be
account of the latter, as well as
credited upon the purchase of the
both Ford and Holden claimed th
was to be applied in that way.
upon this question of facts, the
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In consequence of this disag
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ble delay, for which he is entitl
ited on account.

All the orders, both on his ac
firm, were given by Holden, and
the house were conducted along
without the presence of Ford, an
ing.

The testimony on the subject
themselves, and, as might be ex
That of the defendant, however,
from the testimony of his book
of the parties, and the natural
the other side.

Either way, it is a close case,
court of equity would find it ve
preponderance. It presents a ca
trial by jury, where the witness
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tests.

And this brings to us the
equity possesses jurisdiction to
generally called the vendor's lie
before the existence of the deb
judgment at law. If the debt wa
a mortgage, or deed of trust, or
of judgment, whose existence

face, the jurisdiction would be unquestionable. But the lien in question, at best, is only a tacit one, and whether it exist at all is always dependent on facts and circumstances *dehors* the record, and subject to controversy as to the facts. In Sugden on Vendors, 394, its character is thus described: "On sale of the estate the purchase-money becomes a debt payable out of the purchaser's personal estate, and the equitable lien ought, it is conceived, to be extended to only so much of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient." In *Gilman vs. Brown*, 1 Mason R., 192, it was said by Mr. Justice Story that "the vendor's lien is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is the mere creature of a court of equity, which it molds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it."

In *Garson vs. Green et al.*, 1 Johns. Ch. R., 308, the lien was enforced; but, in that case, a note had been given for the unpaid purchase-money, on which a judgment at law had been first obtained by the vendor before filing his bill, the chancellor saying: "The failure of the personal estate is sufficiently shown in the first instance; and there is nothing to gainsay it, and I shall accordingly decree a sale of the one-third of the house and lot toward satisfaction of the note."

In *Pratt vs. Van Wyck's Executors*, 6 Gill & J., 495, the court say: "If the vendor can, by any proceeding at law, recover the amount due him, chancery never interferes to enable him to assert his equitable lien. His remedy at law must first be exhausted, or it must be shown that none exists there." The same principle was re-asserted in *Richardson vs. Stillinger*, 12 G. & J., 477, in an elaborate opinion, and again in *Ridgway vs. Toram*, 2 Md. R., 203. In this last case the court say:

"In this case, though fraud is charged, the complainants have chosen to affirm the agreement, and bring an action (suit?) for the non-performance of it by the defendant, and, offering the agreement, seek to enforce its stipulations against the defendant by compelling him to pay the purchase-money, which, it is alleged, is a charge upon the land. It is a bill, then, to enforce the vendor's lien for the purchase-money of land sold and conveyed; and the question is whether it charges such facts as, according to well-established principles, will justify this court in extending its aid to him. The rule upon this subject, too well-established to be disputed, is this: that a bill in equity can be filed to enforce the vendor's lien only when the complainant has exhausted his remedy at law, or when he avers in his bill such facts as will show that he cannot have a full, complete, and adequate remedy at law."

To these authorities may be added the opinion of the learned American annotators on Smith's Leading Cases in Equity, vol. 1, pp. 366 and 373.

It is true that the courts of Kentucky and Tennessee have taken a different view of the nature of the vendor's lien, and have treated it as a mortgage which the vendor might enforce in equity, in the first instance, without having obtained a judgment, or taken any steps whatever at law. (See *Hugh vs. Batte*, 10 Yerger, 186; *Richardson vs. Baker*, 5 J. J. Marshall, 323; and *Galloway vs. Hamilton's Heirs*, 1 Dana, R., 576.

But the weight of authority, we think, is on the other side.

The bill in the present cases sets out neither a judgment at law, recovered for the debt in controversy, nor the insolvency or non-residence of the defendant, nor any other ground for the jurisdiction of a court of equity than the simple claim of an original vendor's lien, which it seeks to enforce by a decree in the first instance. The answer as well as the evidence, on the part of defendant, strongly deny the existence of the debt itself. There is no written evidence to establish it; the defendant is in possession of an absolute deed for the property, executed by both the complainants and their respective wives, which acknowledges full payment of the purchase-money - and the testimony, taken altogether, leaves the mind in doubt how the disputed fact ought to be decided.

For these reasons, we think the decree below should be affirmed.

MARTHA J. DAY, PLAINTIFF, vs. THE MUTUAL
BENEFIT LIFE-INSURANCE COMPANY.

AT LAW.—No. 8882.

- I. In an action on a policy of life-insurance the plaintiff, who is the wife of the person insured, is not absolutely concluded by the statement of another party in an affidavit that accompanied the preliminary proofs as to the cause of her husband's death, it appearing doubtful whether she was aware of the contents of said affidavit, and no such evidence being required by the terms of the policy.
- II. The annual premium not having been paid on the 16th of July, 1870, when it became due, the assured applied to the agent of the company on the 1st of October to have the policy re-instated; he paid the premium at the same time and furnished certificates of his health, made by himself and the physician of the company. A renewal receipt was delivered to him on the 14th of the said month of October, and it was held that the assured was under no obligation to furnish the company with further statements of any variation in his physical condition, intermediate the 1st of October and the date of the delivery of the renewed receipt.

The facts bearing upon the points decided are fully stated in the opinion of the court.

A. G. Riddle and Francis Miller for plaintiff.

Edwin L. Stanton for defendants.

Mr. Justice MACARTHUR delivered the opinion of the court:

This is an action to recover \$5,000, the amount of a policy upon the life of Richard B. Day, the plaintiff's husband. At the close of the plaintiff's testimony the counsel for defendant prayed the court to instruct the jury that on the evidence the plaintiff was not entitled to recover; but the court refused so to instruct the jury, and to this ruling the defendant alleged its first exception. This instruction was asked because the preliminary proofs furnished to the company of the death of said Day embraced an affidavit of one Dr. White, who stated, among other things, that deceased

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had been sick five months, and that he died, on the 22d of January, 1871, of pulmonary consumption; which, if true, would have a tendency to show that at the time the policy was re-instated Day was suffering from the disease that caused his death.

To make this point clear, it is necessary to understand that at the trial before the chief-justice the plaintiff put in evidence the affidavits of herself and of several other persons, which defendant produced and admitted were furnished to the company for the purpose of showing due notice and proof of the death of her husband to it. These affidavits were on the same paper which had been provided in blank form by the defendant's agent, and were all offered except the one made by Dr. White; but the court required that the said preliminary proofs of death should be put in evidence as an entirety, which was accordingly done. Now, the counsel of the plaintiff contended that the statement made by Dr. White conclusively showed that Day had untruly represented as to the condition of his health when the policy was re-instated; but this was one of the defenses relied upon to defeat the action, and the burden of proving it was upon the company. In that stage of the case the defendant could ask for no more than that the case should be submitted to the jury, and not that it should, in effect, be withdrawn from it. If the testimony had been closed on both sides the defendant might have a right to rely upon the statement of Dr. White as an admission by the plaintiff if it had been furnished by her and she was aware of its contents. The proof of death was ample without it, and this particular statement was brought into evidence at the request of the defendant, and against the objection of the plaintiff. It was not required by the policy, nor are the circumstances or causes of death necessary to be stated under any of its provisions. It did not appear that the plaintiff had ever seen it. There might be a presumption to that effect from the circumstance that it accompanied the other proofs, but that was a matter for the consideration of the jury. In view of all this, we think the court below was right in holding that the plaintiff not absolutely concluded by the statement of another as to the cause of her husband's death, and ther-

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prayer was properly overruled. *Cluff vs. Insurance Company*, 13 Allen, 308 ; S. C., 1 Big., 215.

After the testimony was closed, defendant asked the court to instruct the jury that if the said Day had any derangement of health between October 1 and October 14, 1870, and concealed that fact from the company, the plaintiff could not recover. It appears that the premium upon the policy was not paid on the 16th July, 1870, when it was due, and that on the 1st of October following Day applied to the defendant's agent, in this city, to have it re-instated; that he then paid the premium and also furnished his own certificate that he was in sound health; and these, together with the certificate of the examining physician of the company to the same effect, were forwarded to its principal office in Newark.

The renewal receipt was delivered on the 14th. Now, the instruction asked for proceeds upon the assumption that Day was under obligation to furnish the company with further statements of any variation in his physical condition intermediate these two dates. But there was no rule of the defendant requiring such additional statements. Day had complied with every condition in regard to the renewal of a lapsed policy, and no further representations were required or contemplated. Whether the contract took effect only from the time of delivery cannot affect the rights of the plaintiff, for it was delivered upon the faith that he had paid the premium and made the required certificate, and there was no rule or contract calling for any further statement as a condition of such delivery. The grounds upon which forfeiture of these policies depend are sufficiently numerous without increasing the number by others which are not provided for. We think the exception was not well taken.

The instruction to which the fourth exception applies was, in effect, that the plaintiff was not to be responsible for any of the statements in Dr. White's affidavit unless she had actual knowledge of its contents and adopted them and used them as her own declarations.

The provision in the policy is that the company will pay the insurance within ninety days after due notice and proof of death of said Richard H. B. Day; upon the performance of this requirement the liability is created. The circum-

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stances and cause of death are not called for by the contract, but the company in their printed forms have a preliminary affidavit, headed "Medical proof of loss, and cause of death," and this is the one made by Dr. White. This is more than the contract calls for. The plaintiff swears positively that the said affidavit was not prepared by her direction or authority; she was aware that Dr. White was preparing some paper in connection with the insurance, but it is doubtful whether she ever saw it or heard it read. If the statement had been in her own affidavit, or had it been a necessary part of the proofs, the defendant would be justified in relying upon it as an admission, and, according to some authority, as an estoppel. *Campbell vs. Insurance Company*, 10 Allen, 213. But as it was neither required nor necessary, we are of opinion that the company had no right to rely upon it, unless she was informed concerning its contents and purpose.

The doctrine that the company was chargeable with knowledge of every fact which their physician might have discovered by examination into the condition of Day's health was held not to apply to the case, and the jury were distinctly told that if Day was not in sound health on October 1, 1871, their verdict must be for the defendant. We cannot see that the defendant was injured by the remarks of the court in refusing the prayers asked for by the plaintiff, nor are we disposed to indulge in nice criticism of the language used, when it is evident that it had no effect upon the verdict.

On the whole record we think the judgment must be affirmed.

ROBERT B. VARDEN, SUSAN McCAULEY, GEORGE McCAULEY, MARY W. SIM, AND JOHN T. SIM vs. WILLIAM B. TODD.

AT LAW.—No. 8170.

- I. An assignment under the insolvent law in force in this District in 1814 vested the property of the insolvent immediately in the trustee, and the court will not presume, after the lapse of half a century, that his debts were paid without a resort to the property assigned, or that a reconveyance of the property was ever made to the insolvent or to his heirs at law.
- II. Such an assignment is an outstanding title, and a good bar to an action of ejectment brought by the heirs at law of the insolvent.

STATEMENT OF THE CASE.

This was an action of ejectment, brought by the heirs at law of Ezra Varden, to recover certain lots of ground in the city of Washington. From the bill of exceptions, it appears that the plaintiffs gave in evidence at the trial a continuous chain of deeds, showing that the property in question was vested in said Ezra Varden on the 5th day of July, 1814. Plaintiffs further proved the death of said Ezra Varden, and that they were his heirs at law. No evidence was offered to prove that the plaintiffs had ever been in possession of the premises, and it was admitted that the defendant was in possession at the time of bringing the suit. On this proof the plaintiff's rested.

The defendant, for the purpose of showing title out of the plaintiffs, offered in evidence an assignment from Ezra Varden to Charles Glover, dated on the 5th day of July, 1814, of all his property, real and personal, of every kind and nature, according to the true intent and meaning of the insolvent law for the relief of insolvent debtors then in force in the District of Columbia; and thereupon the defendant rested, claiming that Ezra Varden, having parted with his title in this insolvent proceeding, and there being no evidence in the case of a reconveyance of said property to Varden or to his heirs at law, the plaintiffs could not recover.

The act for the relief of insolvent debtors of Columbia, passed by Congress, provides that a debtor, on his own application, may have his property, real, personal, and mixed, sold by the court, for the benefit of his creditors, and be discharged from his imprisonment and the expense of the danger of arrest on account of his property of the insolvent would be sold, and the proceeds divided among the creditors in proportion to their respective claims.

The testimony being closed, the court found that, by reason of the last-mentioned act, the said lots, to recover which the plaintiffs were suing the said Ezra Varden, and the said John Varden, in this action, and that they must find a verdict for the plaintiffs, which instruction the plaintiffs requested, and by appeal to the general term.

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A mortgage is presumed to be for twenty years, unless there has been a recognition of it within that period. *See* p. 466, § 528; *Hughes vs. Edwards*, 10 Peters, 466; *Hughes vs. Vattier*, 9 Peters, 415. A set-off set up against the plaintiffs in *Peltz vs. Clark*, 5 Peters, 481; *6 Peters*, 302; *McKnight vs. Defendant* in ejectment cannot be set off, if he is not connected as an outstanding claimant in recovery. *Wood vs. Hildebrand*, 3 Johnson, 386. Although a solvent debtor passes the legal title, if the creditors are satisfied, entitles the assignee, and he may maintain an action in *Ross vs. McKnight*, 12 Serg. & Ejectment, 174. Wherever the

plaintiff's title a superior outstanding title in a third person, under whom he does not claim, it must be a *subsisting and available title*, in which the asserted owner of it might recover in ejectment if he were the lessor of the plaintiff. *Lessee of Foster vs. Joice*, 3 Washington C. C. Rep., 501; and see, also, note to *Robinson vs. Campbell*, 3 Wheaton, 224. In the case before the court the defendant asserts an outstanding title in the assignee of Varden, and it is incumbent on him to show that the title so set up is a subsisting available title. That title if it has any force, derives that force from the provisions of a statute, and a compliance with these provisions must be conclusively shown. It is not enough simply to exhibit the assignment; that assignment must be shown to conform to the requirements of the statute, or the title taken under it cannot be available for any purpose. *Hoag vs. Hoag*, 8 Tiffany, 473.

Walter S. Cox and John F. Hanna, for defendant, contended—

That the deed from the insolvent absolutely divested him of the title to the property in question and vested the same in Glover, the assignee, and that the title thereby vested was an available one, on which the assignee could recover in ejectment; that title is still outstanding, and therefore the plaintiff cannot recover.

In Maryland, the rule has always been that the plaintiff must negative outstanding title, and show in himself the legal title and the right of possession. Alex. Br. Stat., 455. An outstanding legal title is a bar to recovery in ejectment. *Beall et al. vs. Harwood*, 2 H. J., 319, (167.) A defendant in ejectment may resist his adversary by any title, either in his own hands or outstanding, that will defeat him. *Green vs. Scarlett*, 3 Grant's Cases, (Pa.,) 228.

Defendant in ejectment may, for the purpose of defeating plaintiff's recovery, show, *even by presumptive evidence*, an outstanding title in another, though the defendant be in no way connected with such title. *Townsend vs. Downer*, 32 Vt., (3 Shaw,) 203; (quoting *Schanber vs. Jackson*, 2 Wend., 14.) As a general principle, it is sufficient, to defeat a recovery in ejectment, that there is an outstanding title in a third person

superior to that of the plaintiff, although the defendant may not be able to connect himself with that title. *Rupert vs. Mark*, 15 Illinois, 540; *Masterson vs. Cheek*, 23, ib., 72. In order to maintain ejectment, the legal title is necessary; the equitable title is not sufficient. *Leonard vs. Diamond*, 31 Md., 536; *Smith vs. McCann*, 24 How., 398. The holder of an equitable title to land cannot recover it in ejectment, and the grantor of a conveyance in trust to secure payment of debts has merely an equitable title to the premises conveyed. 40 Miss., 793.

Mr. Justice OLIN delivered the opinion of the court:

This was an action of ejectment, tried at the circuit, brought to recover the possession of lots 1, 12, 13, and 14, in square No. 361, in this city.

The plaintiffs show that their ancestor, Ezra Varden, had the title to these lots prior to July, 1814, and that they were his heirs at law.

The defendant in possession, for the purpose of showing title out of the plaintiffs, offered in evidence a deed of assignment of said premises, executed July 5, 1814, to Charles Glover, his heirs and assigns, under and in pursuance of the insolvent law then existing in this District.

Todd, the defendant, gave no evidence tending to show a paper title in himself from Glover, nor did the plaintiff give any to the premises in dispute of possession in themselves or those under whom they claimed since 1814.

Upon this state of facts Justice MacArthur directed a verdict for defendant. The question arising in the case is, whether this court will not presume, after the lapse of half a century, that the insolvent, Varden, paid his debts without a resort to the property assigned for that purpose, and that a reconveyance of this property was made to Varden. From our experience in reference to the settlement of the estate of insolvents, these presumptions seem to us a little too vio'

The judgment of the circuit must be affirmed.

S. C. POMEROY vs. R. H. CLARK ET AL.**AT LAW.—No. 8243.**

- I. Where the defendant is the payee and first indorser on a series of promissory notes, and the plaintiff's name is used as second indorser, and both became parties to the paper for the accommodation of the maker, if, upon notice of non-payment, the plaintiff takes up said notes, he may maintain an action against the said first indorser for the amount advanced on account of such payment.
- II. Where the notes in suit were given in renewal of other notes on which the plaintiff was first indorser and the defendant was second indorser, that circumstance will not change the liabilities of the parties on the notes taken up by the plaintiff, unless there was an agreement between themselves relating to such liability.

STATEMENT OF THE CASE.

The declaration in this case contained eight counts, each upon a promissory note for \$500, except the third, which was for the sum of \$2,000. The defendant Elvans made these notes, payable to the order of his codefendant, Clark, at the bank of Lewis Johnson & Co., which discounted them for said Elvans, after being indorsed by Clark and then by the plaintiff. The notes were dishonored and protested, and the plaintiff paid the same, and now brings suit against Elvans, who made the notes, and Clark, who was the first indorser. There was judgment by default against the maker, and the suit is now defended by Clark alone.

On the trial, it appeared that the series of notes now in suit were given in renewal of other notes, on which the defendant Clark was second indorser and the plaintiff first indorser, but when the notes sued upon were given in renewal, as above stated, of the prior notes, the name of Clark was used as payee and first indorser, and that of the plaintiff as second indorser. There was no agreement or understanding that this change in the order of the names was to change the liabilities of the parties.

It appears also that before the first notes were made Elvans applied to the plaintiff to aid him to secure a loan of money, and

that the plaintiff then owned eight bonds, payable to bearer, for one thousand dollars each, of the Pike's Peak and Union Pacific Railroad and Telegraph Company, which he placed in the hands of said Elvans to aid him in raising the money. These bonds were subsequently delivered by Elvans to the defendant Clark, to indemnify him for indorsing his name on the prior notes, and said Clark deposited the bonds with the banking-house of Lewis Johnson & Co., as collateral security, when they discounted the paper. The bonds were left in the bank after the renewal, as security for the notes now sued on, and when the plaintiff paid the last notes the bonds were also given up to him, and he afterward converted them to his own use.

The plaintiff, in rebuttal, swore in substance that he delivered the bonds to Elvans to raise money, without power to sell, and afterward indorsed said note for him; did not know Clark; did not authorize him to pledge the bonds to the bank; did not authorize Elvans to pledge the bonds to Clark; had no understanding with Clark about indorsing; was not acquainted with him. The last notes Elvans brought to him were indorsed by Clark; knew the bonds had been in the bank, but had been told by Elvans that Clark had them for safe-keeping; knew the bonds were in the bank when last notes were given; also when second notes were given; could perhaps have sold them for fifty cents when took them from bank, but they greatly declined before he disposed of them.

At the close of the testimony the defendant asked the court to instruct the jury that if they found that the plaintiff and the defendant were accommodation indorsers, placing their names on the back of the notes before their utterance to the holder and indorsee, that then they were merely sureties without reference to the order of their names on the back of the notes, and that having paid said notes the plaintiff could only have contribution in this action as against Clark.

The defendant further asked the court to instruct the jury that if they found that the defendant Clark became the indorser on said notes by means and inducements flowing from Pomeroy, then he cannot recover in this suit of Clark.

The defendant also asked the court to instruct the jury

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that if there was no agreement between Clark and Pomeroy in relation to the indorsement of either of said notes, and that there was no other consideration for the indorsement of the last notes but to take up the first, in that case Clark is not liable to Pomeroy for any sum whatever. But the court refused to give said instructions, and the defendant excepted.

The court did, on the other hand, instruct the jury that under the law, and in the absence of any arrangement to the contrary, Mr. Clark is liable to account to Mr. Pomeroy, as the second indorser upon these notes, in the amount that he advanced on account of the payment of them. That the previous relation of these two indorsers to the previous notes, and out of which these notes grew, did not constitute proof, in the absence of any arrangement between themselves, to change the relative position of these two indorsers, under the law, on the notes taken up by the plaintiff.

And the reason the court has come to this conclusion is this: That the liability of an accommodation indorser is not on account of interest, but rests upon his express undertaking alone, and terminates with his undertaking.

And, therefore, the court holds that the history of the antecedent paper is not capable of changing the relation of the parties to the present notes ; to which several rulings by the court the defendant excepted.

The jury returned a verdict in favor of the plaintiff, less the amount of the market-value of the bonds at the time they were converted by the said plaintiff.

The case is now here upon the exceptions.

Bartley & Casey and R. Ross Perry for plaintiff.

L. G. Hine and A. G. Riddle for defendant Clark.

Mr. Justice OLIN delivered the opinion of the court :

After looking carefully into the record in this case I do not perceive that the chief-justice, who tried it at the circuit, committed any error in his ruling of the law, and I think the judgment below should be affirmed.

**ODEN BOWIE vs. THE BALTIMORE AND OHIO
RAILROAD COMPANY.**

AT LAW.—No. 6772.

- I. In an action against a railroad company as a common carrier, for an injury to living freight, a witness was not allowed to answer a question whether the freight had been in fact delivered to the defendant where the delivery was disputed, and other witnesses had stated the facts and circumstances relating to the delivery.
- II. Whether freight has been delivered to a common carrier so as to fix his responsibility is a mixed question of law and fact, and is usually shown by proving that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied with notice to him that it is there for transportation.
- III. Where a contract was entered into by which four horses were to be transported from Washington to Baltimore on the railroad of defendant, and the horses were to be accompanied by their grooms, and if the horses, in accordance with the agreement, were admitted to the inclosure where the defendant usually received such freight, and the defendant notified that they were there; and if the process of loading them had been partially completed by the shipment of three of the horses with their grooms: Held, that, although the agents of both parties were engaged in such loading when the injury occurred, these facts would constitute a delivery of the animals.
- IV. Such an agreement is no waiver of the strict responsibility of the defendant, as a common carrier, any further than it might be modified by the fact that persons were to be sent by the owner along with the property; and if the property is injured through the negligence of the agents of the defendant, it is liable for the damage; and if the injury was caused by the act or conduct of the owner's servants, the defendant would not be responsible.

STATEMENT OF THE CASE.

This case was before the general term in April, 1873, upon a bill of exceptions, and a new trial was ordered. The pleadings being amended the cause was again tried at the October term of the circuit court, 1874, and the plaintiff, to maintain the issue on his part, offered evidence tending to show that on the 20th of May, 1869, Francis M. Hall, on the plaintiff's behalf, went to the defendant's depot in Wash-

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ington and engaged transportation for four horses from Washington to Baltimore on the next day, one of which was the mare *Australia* referred to in the declaration, representing that they were race-horses, and stipulating that they were to be sent in a car by themselves, and were to be accompanied by their trainer and three or four other attendants; that on the next day the animals were sent to the depot in charge of their trainer, one Major Bacon, who had long experience in the management of race-horses, and one other man and three boys of about seventeen years of age; that he brought said horses into the yard of defendant where they were to be received, and upon arriving at the yard Bacon inquired what arrangements had been made for shipping the horses, and was pointed to the car provided for them; that he objected to the car, and another was brought; that one Dennis Blake, defendant's agent, directed him to lead the horses into the car, that he, Bacon, objected to the platform or bridge over which the horses were to be led from main platform into the car, because it consisted of two pieces of scantling, across which were nailed pieces of plank, with the scantling turned up, and which he considered dangerous; he also objected that the place was not suitable, and asked if there was no better, but was told that there was none, and that the horses must be loaded there; that Bacon then attempted to lead the mare on the car, and she refused to go; that several expedients were resorted to, at the suggestion of defendant's agents and others, without success; that Bacon offered to take the responsibility of leading her over a piece of iron lying there if they would allow it, but defendant's agent would not allow it; that Koontz, the superintendent of the defendant, suggested that one of the other horses of plaintiff's should be led into the car first, and the mare *Australia* led after him; that Bacon acted upon this suggestion, but the mare would not follow, being tried after each of the horses, three of which, with the boys accompanying them, were put into the car; that some one announced that the cars were about to start, and said Bacon asked that the other horses be taken out, which the agent of the defendant refused to do or allow; Bacon proposed if a two-inch board lying near was placed at the door he would try to put her over it, and, the board

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being so placed, he attempted to back her over it and failed, and thereupon he declared that he would make no further attempt to load her, but would stay there with the mare, and they might go *to the devil* with the other horses; whereupon two men, whom he supposed to be railroad-men, suddenly seized hold of her and forced her back on the plank, he meanwhile holding the bridle and remonstrating with them, and demanding that they should let her go, and in their attempt to back her on the car they backed her a few inches below the gangway, and her leg went down in the open space between the car and the platform, and the other leg resting on the board, which, in her struggle to get up, was broken; she was severely injured and ruined for life; that after she was extricated, the cars were moved to another place, where there was a shoot well adapted for the loading of horses, and having sides to protect the animal against the danger of falling between the car and platform, and where she was loaded without difficulty, whereas the first place was dangerous and wholly unsuitable, the car being drawn up alongside the platform several inches from it, and no provision being made to protect a horse from going down between the car and platform or either side the gangway leading from platform to car; that he, Bacon, considered himself acting under the directions of the defendant's agents throughout. And said Bacon admitted, on cross-examination, that Koontz, the defendant's general agent, requested him to give him the mare to lead, intending to back her into the car, and said Bacon refused to allow said mare to be backed, saying that Governor Bowie had sent him there to see to their proper shipment, and she was too valuable an animal and should not be backed; said Bacon further testified that he informed defendant's agent that the mare was wild and of great value, at least \$10,000; that before the plank was tried, said Koontz moved away and he heard no order given by him to desist from attempts to load at that point, or any intimation that he would move the car to another; evidence was also given to show that the mare was of the market-value of about \$10,000 as a racing mare, and that her value as such was wholly destroyed by the accident in question.

The defendant then offered evidence tending to show that

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George S. Koontz was the general agent of the defendant at its Washington depot, and Dennis Blake was specially detailed to attend to the loading of horses, cattle, &c.; that, when Bacon arrived with the horses, Blake designated the car prepared for them, and Bacon attempted to lead the mare *Australia* into the car; that Koontz came upon the platform where he was, and suggested to Bacon to load the other horses first, and that he also requested Bacon to give him the mare to load, as he was more experienced in loading horses, and Bacon refused, saying that Governor Bowie had sent him there to load the horses and he meant to do it, and would not give them to any man; that Koontz thereupon ordered the platform to be removed and that no further attempt should be made to load her there, and told Blake, whom he left in charge, not to allow it, saying he would have the engine brought and the car removed to another place; that after he left, Bacon tried to load her on a plank before referred to, and Blake testified that he remonstrated against the attempt and half closed the door, and Bacon said he would take the responsibility; that Bacon held the mare's bridle, and two men who were not in the defendant's employ pushed the mare on the plank, and it broke and she fell through; that no men in the employ of the defendant had hold of the mare at any time, and the men who were assisting to get her in were not the agents of the defendant, and said Koontz did not consider her in his charge at any time before the accident, nor did any agent of the defendant's announce that the train was about to start, nor was such the fact.

The defendant's counsel then proposed to inquire of Koontz, who was examined as a witness, whether in fact the mare was delivered to him; but the court refused, objection being made by plaintiff's counsel, to allow the question to be answered, insisting that he should state what facts transpired, that the court might determine if they constitute delivery in law; to which refusal the defendant, by its counsel, excepted.

On cross-examination, Dennis Blake stated that he saw the two men seize the mare and back her after Koontz left, and after his instructions from Koontz not to allow any further attempt to load at that place, and that he did not order them to desist nor inform them of Koontz's order; did not assist

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Bacon in making them desist, and neither called out to them or interfered with them in any way whatever, and does not know how the door was opened, or whether it was opened or not, and that one of the men who so seized the mare by the bit and backed the mare at the time she fell, though not in the employ of defendant, was a man who was always about the depot, engaged in business as an expressman, who was allowed to help to load and unload the cars, and who had assisted him, Blake, in placing platforms and gangways for these horses to pass over. The witnesses of defendant further testified, on cross-examination, that the horses were brought by Bacon into the inclosure belonging to the defendant connected with the depot and appropriated by defendant to the reception by the company of horses intended for shipment.

It also appeared on cross-examination, and from the books of defendant, that Bacon had paid for the transportation of the horses as soon as he reached the inclosure referred to with the horses, and before any attempt made to load them.

At the close of the testimony the defendant asked the court to give the following instructions to the jury :

FIRST PRAYER—(REFUSED.)

That on the whole evidence the plaintiff is not entitled to recover in this action.

SECOND PRAYER—(REFUSED.)

That, in order to sustain this action, the burden of proof is on the plaintiff, to show a complete delivery of the mare to the defendant, and that the plaintiff's agent had relinquished all exclusive *possession* and control of her before the injury complained of occurred ; and, unless such complete delivery be shown, it is immaterial in this action whether the arrangements made by the defendant for loading the animals on the cars were proper and sufficient or not.

THIRD PRAYER—(GRANTED.)

That the plaintiff is not entitled to recover in this action without proving that he delivered the mare to the defendant, to be carried as alleged in the declaration ; and if the jury

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find that the plaintiff's agent retained control of her for the express and avowed purpose of conducting her safe shipment on the cars himself, and had not parted with that control to the defendant at the time the injury occurred, they must find for the defendant.

FOURTH PRAYER—(REFUSED.)

If the jury find that plaintiff's agent declined to deliver the mare to defendant's agent to be shipped on the cars, but retained control of her for that purpose himself, and defendant's agent assigned for that purpose a place in the depot which he had reasonable ground to believe suitable, and assisted the plaintiff's agent in the effort to ship her at that place, but, finding unusual difficulty in so doing, desisted from and forbade further efforts so to do, and proceeded to provide another place which was unobjectionable, where the animal was afterward successfully shipped, and that meanwhile, in an effort renewed to ship her at the first-named place by the plaintiff's agent or others not in the employ of the company, against the orders of said defendant's agent, the mare suffered the injury complained of, the plaintiff is not entitled to recover.

FIFTH PRAYER—(REFUSED.)

If the jury find that while the mare was still in charge of the plaintiff's agent persons casually present, and not in the employ of the defendant, attempted to load her on the car without or against the orders of defendant's agent, the defendant is not responsible for any injury that resulted from such attempt.

SIXTH PRAYER—(REFUSED.)

Although the jury may find that the defendant's agent suggested or advised or forbade the use of means for shipping the mare while she was in the charge of the plaintiff's agent, this was not an assumption of possession sufficient to charge the defendant as a common carrier in this action.

SEVENTH PRAYER—(GRANTED.)

Even if the jury find a delivery, yet if they further find that after such delivery the plaintiff's agent interfered to con-

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trol the shipment of the animal, and was so doing at the time the injury occurred, plaintiff is not entitled to recover.

And the court granted the third and seventh instructions prayed, but refused all the others; to which refusal, as to each of the instructions so refused, the defendant, by its counsel, excepted.

It is not necessary to state the instructions asked for by the plaintiff, as they were covered by the general charge of the court to the jury, and the portions of the charge to which exceptions were taken by the defendant are related in the opinion. The jury returned a verdict in favor of the plaintiff for ten thousand dollars, and the cause is here upon the foregoing exceptions.

R. T. Merrick, with whom was *Bernard Carter*, of Baltimore:

The rulings of the court below, assigned for error on this motion, are embraced in two bills of exceptions.

The first bill of exceptions relates to a question of evidence.

The second and third bills of exceptions relate to the instructions granted by the court to the jury.

We shall first consider the second bill of exceptions.

And, in considering the rulings of the court therein embraced, we shall first consider the charge of the judge. This charge will be found to contain a comprehensive and accurate statement of all the law necessary or proper to have been given to the jury in the case. It disposes of all the real questions of law in the case. The propositions embraced in this clause are as follows:

1st. That to charge the defendant with the strict law applicable to common carriers of freight and the responsibilities thereby imposed, the evidence must show that there was a complete delivery of the animals in question to the defendant, and that until such complete delivery the said responsibility did not commence.

2d. That in order to determine whether there was in this case such a complete delivery as would charge the defendant as common carriers, the jury are first to take into consideration the evidence showing that at the depot of defendant

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there is a yard surrounded with an inclosure and supplied with a platform alongside of the railroad for loading horses, with apparatus for getting horses on the platform from the yard and from the platform into the cars, and if they find these facts, then these premises thus inclosed are to be considered as the place for receiving freight. Then, having ascertained this, if they further find that, in pursuance of a contract made the day previous with the defendant by the plaintiff for the transportation of the four horses, one of which was Australia, these horses were taken to and admitted within the above-mentioned inclosure and into the said yard, and the proper agents of the defendant notified that the horses were there to be shipped, and that so being notified the horses were led up from the yard on to the platform, and the loading into the cars commenced, and in good part finished, by the shipment of three of the horses, and that the agents of defendant as well as the persons sent by the plaintiff in charge of the horses, in pursuance to the agreement as previously made, were engaged in this business of loading said four horses, then, in the opinion of the judge, all these facts taken together would establish such a delivery of the animals as to raise the strict responsibility of a common carrier.

3d. But even if there was complete delivery found by the jury, yet the defendant still would not be responsible for the injuries of the animals if they occurred in the loading, and these injuries were occasioned by the negligence or misconduct of the persons sent by the owner in charge of the animals. We submit that if there was any error in this charge it was committed against the plaintiff instead of the defendant. The defendant takes no exception to all that part of the charge which is embraced in the first and third of the points into which we have divided and epitomized the charge. It is only to the second point or division that the exception goes. So far as the point decided in the third division is concerned, viz, that plaintiff, even after delivery, is responsible for the acts of his servants accompanying the animals, some cases have held that the owner is not responsible for such acts, but that such persons become practically the agents of the carrier.

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But, as we have said, if there be any error here it is all in favor of defendant, and of course it cannot complain. We think, however, reason and authority clearly with the learned judge in his view of the case in this part of the charge as well as in all other parts of it.

The only question, therefore, raised by the exception to the charge is to the rulings of the court in the charge on the question of delivery. The animals were freight, and therefore the general law relating to the carriage of freight applies, except so far as it is modified by the fact that they are animals, and that persons to take charge of the animals are, by the contract made the day previous, to accompany them.

What, then, is the law relating to the relation delivery bears to the beginning of the responsibility of the carrier, as applied to freight generally? This is well settled in the authorities.

1st. The responsibility of the carrier begins whenever and as soon as the goods have been delivered to and accepted by him for the purpose of transportation. 2 Redfield on Railways; 6 Gray, 541; 11 Allen, 80, *Merritt vs Railroad*.

2d. Where a carrier has a usual place for the reception of freight, and goods are placed there with orders to ship them, and the agents of the carrier having charge of such matters are notified of their being there, this is a delivery of the goods to the carrier, and he is from that moment responsible, though they are not loaded in the cars. Though acceptance of the goods by the carrier is necessary to constitute delivery, this acceptance is implied from the delivery at the usual place with notice to the agents and no express dissent or refusal to take them. 4 Foster N. E., 71; 4 Jones N. C., (Law,) 47.

3d. Where the goods are sent to the depot, or usual place for the reception of freight, in pursuance of a previous agreement that they will be carried, of course there is no necessity to rely on the implied assent to receive them when they are placed in the depot, because here is an express assent to receive them.

4th. It is perfectly clear, therefore, under the preceding authorities, that the charge of the court as to what facts, if

found by the jury, were sufficient to constitute a complete delivery was correct, unless the fact that the articles to be delivered were animals, and were accompanied by persons to take charge of them, renders said facts insufficient to constitute a delivery. Indeed, an examination of the charge will show that the charge predicated the conclusion by the jury of a complete delivery on the finding of *more* facts than were necessary to be found to constitute delivery under the preceding authorities.

These authorities declare that where goods (and it makes no difference whether they are animals or other subjects of freight) are carried into the proper freight-depot to be transported, and notice of their presence given, and no refusal to receive or transport them made, this placing them on said premises is *itself* a complete delivery; and it is not at all necessary that the loading should be commenced or completed. But the charge did not authorize the finding of delivery simply on the finding of the facts just mentioned, but required the jury to be further satisfied that the agents of defendant had actually commenced the loading, and got so far in it as to load three out of the four horses. The charge, in other words, cast a greater burden on us than we were really obliged to carry. But of this of course defendant cannot complain.

5th. It is equally clear that, so far as the question of delivery is concerned, the fact that the freight consisted of animals makes no difference. So far as any distinction is made in the authorities in reference to the obligations of carriers of animals as compared with other freight, it is only that for injuries caused to them after delivery the carrier, if he uses due diligence toward the same, is not responsible for injuries caused by the inherent qualities or nature of the animals, and which no precaution could guard against.

6th. Nor does the fact that the horses were in charge of their groom make any difference on the question of delivery. It is to be remembered that their accompanying the horses was a part of the agreement made the day before in their transportation.

This being so, as soon as the horses were taken into the freight-depot, and at the usual place for loading horses, and

the agents of the company notified that they were brought there in pursuance of the previous agreement, and were there to be transported, and that they were there ready to be put aboard, this was of itself a complete delivery under the above authorities. The fact that men were alongside of them can in the nature of things make no difference on the *question of delivery*, if the above-mentioned facts were found. If goods are delivered when so placed, why not also the horses? We call attention to the difference between the presence and conduct of the men in charge as affecting the question of delivery, and such conduct affecting the plaintiff's right of recovery. The charge of the judge distinctly concedes that although the jury should find there was a delivery, yet the conduct of the plaintiff's servants was to be inquired into, to determine whether such conduct caused the accident.

Even if it be conceded that such conduct caused the accident, this does not touch the question of delivery, provided the jury found the facts hypothetically stated for them by the judge. For illustration, suppose Australia had actually been loaded into the car and the train had commenced its journey to Baltimore, yet if the misconduct of the plaintiff's agent in the car caused the injury, the plaintiff could not recover. This shows, therefore, that provided the facts were found by the jury on which the court predicated the conclusion that such would amount to a delivery, there was a delivery even though the conduct of the men in charge while assisting in loading the horses caused the injury. The conduct of the men in charge as affecting the delivery is one thing, and their conduct as affecting the plaintiff's right to recover is another. The charge clearly draws the distinction. We conclude, therefore, that in reality the presence of the men with the horses does not at all vary the law on the subject of delivery, provided the jury found, first, that there was a previous agreement between plaintiff and defendant that the horses were to be transported; second, that they were in pursuance of this taken to the proper place for their reception, and the agents, being notified, entered upon the work of loading; and the same conclusion would have resulted, even if the loading had not commenced.

In addition to the authorities already quoted in reference

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to other species of freight, we refer to the following, in which it will be seen it is declared, 'in cases where it happened animals were the kind of freight in question, that the delivery is complete in law from the moment the animals are on the premises of carrier, and he evidences by word or act the assent of his mind to take possession of them; and this is the case notwithstanding the animals come and remain in charge of a driver or other persons. (See the following cases: 1 McCord, S. C., 446, *Cohen vs. Hume*; 2 Red. on Rail., P., 130, note; 5 Missouri, 37, *Pomeroy vs. Donaldson*; 37 Mississippi, 691, *Powell vs. Mills*; 4 Ohio State Rep., 743.)

Walter S. Cox, with whom was *James A. Buchanan* of Baltimore, for defendant:

At the hearing of this appeal the defendant, by its counsel, will respectfully contend that the motion for a new trial should be granted for the following reasons:

1st. Because the court below erred in refusing to allow the defendant's witness, Koonz, to answer the question whether in fact the mare was delivered to him, because, as delivery to the owner or its agent may be either actual or constructive, the defendant had a right to inquire whether there was any actual delivery to it or its agent Koontz. (See 2 Redfield on Law of Railways, p. 48, section 6.)

2d. Because the court below erred in refusing defendant's first prayer, because that prayer correctly stated the law applicable to the evidence in the cause, and should have been granted. *White vs. Winnimisset*, 7 Cushing's Reports, 155; *Wilson vs. Hamilton*, 4 Ohio State Reports, 722.

3d. Because the court below erred in rejecting defendant's second prayer, as said prayer is a correct statement of the law applicable to this case. As it was necessary for the defendant, or its agents, to have exclusive possession and control of the mare before the liability of defendant attached, how could any defect in the means and appliances furnished by the defendant for loading the mare affect the question of its liability? (See *Harris vs. Northern Indiana R. R. Company*, 20 N. Y. Reports, 232; 2 Redfield's American Railway Cases, 368-373.)

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4th. The court below properly granted the defendant's third prayer, but erred in refusing its fourth prayer, as said fourth prayer is a correct statement of the law applicable to the case, and should have been granted. (See 2 Redfield on Railways, p. 41, section 155, and cases cited in note 12; particularly *White vs. Winnimisset*, 7 Cushing, 155; *Wilson vs. Hamilton*, 4 Ohio State Reports, 722; 2 Redfield on Railways, 49, sec. 156, sec. 7, and cases cited in note 7; Story on Bailments, 487, sec. 532, 488, note 1, 489, sec. 533, and cases cited in notes 3 and 4, sec. 537, 567, and 578.

5th. And the court below erred in refusing the defendant's fifth prayer, for the reasons and upon the authorities given and cited under the fourth point. And, moreover, it is respectively submitted that until delivery the extraordinary liability of a common carrier does not attach, so as to make such a carrier responsible for the unauthorized acts of third parties.

And it is respectfully submitted that the portion of the judge's charge excepted to by the defendant does not lay down the law of delivery as applicable to the case at bar, and therefore the motion for the new trial upon exceptions should be granted. (See Story on Bailments, 486, sec. 532; Redfield on Railways, 46, sec. 156, and 47, sec. 156-4, and cases cited in note 3; 2d Redfield on Railways, 41, sec. 155, and cases cited in note 12; *White vs. Winnimisset*, 7 Cushing 155; *Wilson vs. Hamilton*, 4 Ohio State Reports, 722; 2 Redfield on Railways, 48, sections 156-7, and cases cited in note 7.)

Mr. Justice MACARTHUR delivered the opinion of the court:

The question asked the witness Koontz, whether the mare for whose injury the action was brought had been in fact delivered to him, was not allowed to be answered by the court, and we think the ruling was right. Other witnesses had already stated the facts and circumstances of the delivery, and it was manifestly a question to be determined by the court and jury upon the evidence.

It is urged that the court below erred in refusing several of the instructions asked for by the defendant's counsel, and

in that portion of the general charge to the jury relating to the subject of delivery. It is now well settled that whether freight has been delivered to a common carrier so as to fix his responsibility, is a mixed question of law and fact. The circumstances that really took place must be submitted to the jury, but whether they amount in law to a delivery is properly within the province of the court. There is no doubt that delivery must transpire in order to create the liability of the railroad as a common carrier. This is usually shown by proving that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied by notice to him that it is there for transportation. If there is a special agreement with the company to convey the property, the special circumstances required by the contract are to be taken into consideration; or if there is anything peculiar or exceptional in the nature of the property, that also may have a bearing upon the decision. In the present case we think the charge of the court adhered to these familiar principles.

In the remarks of the court which are excepted to, the jury are told in substance that if they believe the defendant had a yard at their depot in this city, surrounded by an inclosure and having a gate by which horses and other animals are admitted therein, and that such animals are led from this inclosure on to the platform, and then pass over a gangway into the car which is to transport them, that such inclosure is to be regarded as the place provided by the railroad company for the reception of freight of this description.

The charge then says :

“Now, then, one step further. If it should appear to you from the testimony in this case that a contract was entered into by which four horses were to be transported from this city to Baltimore by the defendant, on its railroad, and that the execution of this contract was to commence on the day following; and these horses were taken to this inclosure and admitted to it, the officers having notice that they were there for the purpose of being shipped; and if you should further believe that from the yard they were led up on to the platform; that the process of loading had absolutely been commenced, and in a great measure completed by the shipment of three of the animals; and that the agents both of the company and of the persons who had been delegated by the owner

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of the horses to attend them, were engaged in this business; then I think that the facts would establish a delivery of the animals so as to raise the strict responsibility of a common carrier in regard to them."

This instruction is excepted to on the ground that it does not appear that the horse in question had been surrendered into the exclusive control and possession of the defendant's agents. This objection seems to overlook the special agreement, by the terms of which the horses were to be accompanied by their trainer and three or four other attendants. They were valuable race-horses, and the agreement was certainly a prudent and wise one, and should be so construed as not to relieve the defendant any further than its plain import will sanction. Its reasonable and natural meaning undoubtedly is, that the defendant agrees to accept the horses and carry them and the attendants who were to accompany them on the passage. There was no waiver of the strict responsibility of the defendant as a common carrier any further than it might be modified by the fact that persons were to be sent by the owner along with the property. In the light of this interpretation the facts referred to in this part of the charge would clearly constitute a delivery. But it is further objected that the jury were also told this delivery would raise the strict responsibility of a common carrier in regard to the animals; and if the charge stopped there, perhaps the exception would prevail. But both before and after the above-cited passage, the jury were instructed that the special agreement, by the terms of which the owner was to send his servants with the property, had an important bearing upon the responsibility which the court had described to them as belonging to the character of a common carrier. On pages 14 and 15 of the printed record is the following language in the charge to the jury:

"The reception and transportation of a horse must be accompanied by different circumstances and by different incidents from the transportation of a bale, or of a box, because, to a certain extent, it is gifted with intelligence, and appetite, and volition, and is liable to sickness and death from natural causes, and when an accident occurs from any of these incidents the common carrier is not responsible. It appears from the testimony in this case that these were horses

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of a peculiar kind, race-horses of great value, and the one injured of rare qualities; under these circumstances an arrangement of this kind is approved by motives of public policy, as well as required by the necessities and interests of individuals, that living freight, as in this instance, should be accompanied by persons employed by the owner to look after it during the journey, and it is a right as well as a righteous concession on the part of the common carrier to recognize such arrangements and carry them out. You will at once see that this being the case it must have an important bearing upon the strict responsibility which I have described as belonging to a common carrier. Under such an arrangement the servants of the owner himself, if he accompanies their freight, are in no sense the agents of the common carrier so as to make him responsible for their conduct or misconduct. It is by an arrangement between the parties that this is permitted to be done, and, I apprehend, while it accommodates both, each of them must be responsible for their own acts; and the acts of a servant of the company is the act of the company itself, and the act or conduct of a servant of the owner of the property must likewise be considered in law his act, and this must be the measure and grade of their responsibilities; that is, each of them must be responsible for their own acts.

“When the agents of both parties are present at the occurrence of an accident and co-operating together at or about the same time, it will always involve very fine discrimination and good judgment to lay the blame where it properly attaches. That will be your duty in this case. There is no difficulty in laying down a general principle, and I instruct you that as a general principle the parties, as I have before stated, must be responsible for their own acts. If the accident occurred through want of skill or from negligence of the agents of the company, they are liable for any damage.

“If the accident occurred through the conduct or the acts of the agent of the owner, the company would not be responsible.

“Now, this is the general principle which I think should regulate, and which I instruct you in matter of law does regulate, the liability and responsibility of these parties in a case of this description.”

Now, while the portion of the charge excepted to lays down a general principle in the case, it is of course to be taken with the qualifications just read. What is material cannot all be said at the same time, and the different parts are to be considered in order to obtain a fair exposition of the whole. It is quite clear from this examination that while the jury were informed of the circumstances which would show a delivery and fix upon the defendant the liability of a common carrier, yet they were also told that as in this case there was a special contract for the transportation of the horses, the conduct of the owner's servants might be inquired into, and if their act or negligence caused the accident, the defendant was not responsible. It was also left to the jury to decide whether there was a delivery, for there must be a delivery before the plaintiffs could recover, and that the defendant was only liable for the conduct of its own agents. Upon this view we are inclined to think that there was no error in the charge.

We believe that these observations dispose of all the prayers of the defendant that were refused except, perhaps, the fourth one. By this prayer the jury were to be instructed that if the plaintiff's agent declined to deliver the mare to defendant's agent the company would not be liable if said agent forbade efforts to ship the mare, and she suffered the injury complained of by the acts of the plaintiff's agents or of other parties in an attempt to load her. This was simply saying if there was no delivery there was no liability, and the jury were told this more than once, no matter how the injury happened or by whom or what it was occasioned. The prayer is rather complicated in the hypothetical assumption of facts and would have confused if not misled the jury. They had been informed in the prayer immediately preceding that the plaintiff could not recover without proving that he delivered the mare to the defendant. The same thing was repeated in the charge. So that it matters not what were the orders of the defendant's agent, or whether the plaintiff's servants or others caused the injury, in the absence of delivery. The vice of the prayer is that it involved the consideration of circumstances wholly immaterial if there was no delivery.

Upon the whole, we are not disposed to disturb the judgment.

DAVID DILLON vs. WASHINGTON GAS-LIGHT COMPANY.

AT LAW.—No. 11264.

- I. The Washington Gas-Light Company is authorized to use the streets of the city for the purpose of laying gas-pipes, but it is the duty of the company to perform the work so that other persons may receive no injury through the negligence of the company, or of its agents, in such use of the public streets.**
- II. Where an individual has received an injury by falling into a trench dug in a traveled street and imperfectly filled up, the company will not be relieved from liability therefor, although the work has been approved of and accepted by the officers of the District government.**
- III. It is the duty of the company to put the street in as good condition as it had previously been, and also to exercise a careful foresight so as to prevent any injury afterward which might be occasioned to the work by storms and rain-falls, and which would render the work dangerous to persons traveling on the street.**

The case is stated in the opinion of the court.

E. C. Carrington for plaintiff.

W. B. Webb for defendant.

Mr. Justice MACARTHUR stated the case, and delivered the opinion of the court :

This action was brought by the plaintiff to recover damages occasioned by the negligence of the defendant in permitting the street or common highway at the intersection of K street north and Fifth street west, in the city of Washington, to remain out of repair and be in a dangerous condition, whereby the plaintiff was greatly injured.

From the testimony at the trial it appears that the plaintiff was a hackman, was driving his carriage, in which were two passengers, along K street, and when he came to the intersection of Fifth street his horses and hack fell into a ditch which he did not see, and he was thrown from his seat upon

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the front wheel, injuring himself and his horses and harness. This occurred on the evening of the 16th of August, 1873, and there were no signals to warn persons driving along there with carriages of any danger in passing. And it further appeared that the ditch where the accident occurred had been dug by the defendant for the purpose of laying a gas-main, and it had been filled again to the surface of the street and the work completed on the 7th day of the same month of August. That afterward heavy rains occurred, and on the 15th the trench, which had sunk somewhat, was again filled up to the surface so as to conform to the grade of the street, and that the work was done by the agents of the defendant to the satisfaction of the superintendent of the streets; that the night before the accident occurred there was a heavy rain, so that the surface of the trench again sunk, and the plaintiff traveling thereon the said 16th of August, between 7 and 8 o'clock in the evening, with his hack, drove into said trench and received the injuries for which he claims damages.

After the evidence was closed, the counsel for defendant requested the court, among other things, to instruct the jury, in substance, that if the defendant had completed the laying of the gas-main, and filled up the trench, under the direction and to the satisfaction of the superintendent of streets, and had given up all control of said street to the contractor who was then working upon it, they must find for the defendant. The court refused so to instruct the jury, and the defendant excepted. It is contended that this refusal was erroneous, for the reason that the ordinance of the late corporation of Washington of June 2, 1853, provides that the earth displaced for laying gas-pipes in the streets shall be properly rammed, and the pavement adjusted to the satisfaction of the commissioners of the respective wards wherein such pipes are laid, and the streets, avenues, and pavements returned to the same state as previous to being opened; and for the further reason that the regulations of the board of public works require the superintendent of streets to see that trenches opened in the streets are thoroughly puddled so that the whole filling may be thoroughly wet. Now, the defendant's counsel say that, by a true construction of these

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enactments, when work is done on the public streets by the defendant to the satisfaction of the superintendent, and has been accepted by the public authorities, and taken possession of by a contractor who is performing work on the same, all responsibility on the part of the defendant ceased from that time. It seems to us their view of the law is clearly erroneous. There is no contest about the fact that defendant dug a trench at the place where the accident occurred. The evidence of the plaintiff went to prove that frequent complaint had been made to defendant of said ditch, and that similar accidents had happened there to other persons besides the plaintiff, and that defendant merely trimmed it by throwing dirt loosely upon it without ramming it down. The defendant alleges it has contradicted this by showing that no complaint had ever been made at its office. The evidence established the further fact that at the time of the accident the ditch had sunk below the surface of the street, causing the injury complained of. There can be no doubt that the defendant was authorized to use the public street for the purpose of laying gas-pipes, and that it must perform this work to the satisfaction of the proper officers. The object of this requirement was to preserve the streets in a passable condition, and to prevent accidents to people traveling over them. Indeed, the city could not resign this duty without giving up its rightful power. But it would be strange if the exercise of this necessary control should relieve the defendant from all responsibility for injuries received by other persons through the negligence of the defendant or of its agents in the use of public streets. We are not called upon to determine what the defendant's responsibility would be to the city where its work is approved of and accepted by the officers of the Government. But where an injury has been sustained by a third person through the fault of the defendant, his rights cannot be affected by the discretion of a public officer or city contract or in accepting imperfect work. The defendant had no right to leave pits or excavations in the traveled streets of the city, and if a commissioner should approve of the same, will it be contended that the defendant is relieved from the consequences of its carelessness, and from all liability to individuals who have suffered from it? The superintendent may

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accept the work, if he will, so far as the city is concerned, but he has no right by that act to absolve the defendant from its liability to other persons, who may have been injured by its negligence. We think the instruction asked for was properly refused by the court.

Another point presented on the record is, that the court refused to charge the jury that if the trench was filled up to the level of the street, and its surface afterward sunk by reason of the action of continued rain, and if such sinking was not the result of defendant's negligence, then the defendant was not liable.

This instruction, it will be seen, did not refer to the condition in which the street was left or the manner in which the work had been performed, but it has reference to the subsequent action of rain upon the trench. It is to be remembered, however, that the defendant is bound to put the street in as good condition as it had previously been, and there can be no doubt that he is also required to exercise a prudent and careful foresight, so as to avoid any injury afterward. Storms and rain-falls belong to the ordinary course of nature, and common sagacity could foresee the consequences which they might occasion to such operations. It was reasonable to expect that the new-made ditch would sink under the action of a heavy rain, unless it had been properly rammed or puddled, and ordinary care could not only foresee but obviate the danger. It appears that a water-main had been laid about the same time contiguous to and parallel with the said ditch, and over which the plaintiff had passed with entire safety before falling into the defendant's ditch, thus showing that the contingency of the weather can be guarded against so as to render the streets passable without danger to any one. It is, therefore, clear that the jury should not be instructed that if the sinking was occasioned by the action of continued rain the defendant would not be responsible.

The action of the court below was correct, and the judgment must be affirmed.

ANDREW J. SECOR vs. POLLY SECOR.**IN EQUITY.—No. 3508.**

- I. A divorce will not be granted on the ground of the alleged insanity of the wife previous to marriage where more than thirty years have elapsed since the marriage, and a family of children are still living who have reached the age of maturity.
- II. The use of violent language and irritability of temper are not causes of divorce.
- III. Where husband and wife agree to live separate and apart from each other, there can be no divorce on the ground of abandonment.

STATEMENT OF THE CASE.

Petition by the husband for a divorce *a vinculo*.

The complainant sets forth in his petition that he was married to the defendant in October, 1841. He also states the birth and names of three children, who are now living, and all of whom have arrived at the age of maturity. He further says that when he married the defendant she had been previously afflicted, without his knowledge, with periodical attacks of insanity, and that such attacks have continued ever since, lasting for months together, and rendering it often dangerous for complainant to live with her; that she has been in the habit of abandoning her home and children for months at a time, and is often irritable, profane, and violent in her language; that, owing to her quarrelsomeness and ill-temper, they have lived very unhappily as husband and wife, and that in the month of April, 1873, she refused to live with him any longer, or to perform any of the duties of a wife, and that in consequence of this bad treatment his health is seriously impaired and his life made wretched.

Testimony was taken tending to sustain these allegations, and from which testimony it further appears that the marriage took place at Royalton, in the State of New York, and that she on one occasion, at Johnston Creek, in said State, had the door of the house where she then was fastened, and cut both her arms with a razor, and would have bled to death

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had she not been discovered and taken care of. Witnesses state she was then insane, and that her insanity was probably hereditary. There is no other direct testimony of her insanity previous to her said marriage.

The complainant has resided in this District since 1866, but the defendant has never accompanied him, and has always continued to reside in said Royalton, and for several years they have lived apart. It also appears from the proofs that in the month of October, 1873, it was agreed by the complainant and defendant that they would live separate and apart from each other, and a division of their property between them was then made by articles of agreement to the satisfaction of both parties, and it was understood that they would live no more together.

The bill was dismissed in the court below, and on appeal to the general term the decree was affirmed, the court saying that the alleged insanity of the wife was settled too long ago by the marriage of the parties, and the birth of a family all the members of which have reached the age of maturity, and that a marriage after the lapse of more than thirty years ought not to be disturbed for such a cause. The court also held that where the parties agree to live separate and apart from each other there can be no divorce on the ground of abandonment.

Belva A. Lockwood for complainant.

No appearance for defendant.

CATHARINE JACOBS VS. THE NATIONAL LIFE-INSURANCE COMPANY OF THE UNITED STATES OF AMERICA.

AT LAW.—No. 10849.

- I. A declaration on a policy of life-insurance stated the consideration to be the payment of premiums quarterly. The policy proved at the trial was expressed to be in consideration of said premiums, and of the statements and declarations made in the application for the policy. Held, that the variance was not material.
- II. The application presented to the company, when the insurance was effected, is no part of the plaintiff's course of action, and need not be set forth in the declaration.
- III. It is competent for a life-insurance company to waive forfeitures, so as to give renewed effect to a life-insurance, where the premium has not been paid at the time it was due; and a stipulation in a life-policy that it shall cease and determine if any subsequent premium shall not be paid when due, is waived by the act of the company in receiving and retaining the premium after that time.
- IV. A witness was permitted to testify what the insured told him, where the door was opened to its introduction by the cross-examination of the witness on the other side.
- V. A condition in a policy of life-insurance that it is to become null and void in case the insured shall die by his own hand or act, voluntarily "or otherwise," the use of the latter word is too vague and intangible to admit of practical application, and the court will not undertake to enforce a provision so uncertain.

STATEMENT OF THE CASE.

Action on a policy of life-insurance for \$5,000, issued by the defendant to the plaintiff, on the life of her son, Edward N. Jacobs, and bearing date on the 27th day of November, 1871. The only consideration stated in the declaration for the contract is the payment by plaintiff to defendant, quarterly, of the sum of fifty-seven dollars and forty cents. It is also alleged that the said Edward N. Jacobs died on or about the 19th day of January, 1873, while the said policy was in full force; and that proof of such death was furnished to

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defendant, and that sixty days have expired, and defendant refuses to pay.

The defendant pleaded that it never was indebted; and that it did not promise as alleged in the declaration. The third plea is in these words:

"And the defendant says that, by the terms of the policy of insurance in the declaration in this case mentioned, the same was to become null and void, and the defendant was not to be liable for the sum insured by said policy, in case the person whose life was insured by said policy, to wit, Edward N. Jacobs, should die by his own hand or act, voluntarily or otherwise; and the defendant says that said Edward N. Jacobs did die by his own hand and act, whereby said policy became null and void. And this the defendant is ready to verify; wherefore it prays judgment whether it ought to be charged with the plaintiff's demand."

Upon the trial of the cause the plaintiff offered in evidence the policy of insurance, which is expressed to be made "in consideration of the representations and declarations made to it (the defendant) in the application therefor, and of the sum of fifty-seven dollars and forty cents * * and the quarterly annual payment of a like amount on or before the 27th days of November, February, May, and August."

To the introduction of said policy in evidence the defendant's counsel objected on the ground that there was a variance between the policy offered and the one described in the declaration, in respect to the consideration of the contract declared on, which is stated to be the payment of certain premiums; whereas the consideration of the policy offered in the evidence consists of the representations and declarations made to the defendant in the application therefor, as well as of the premiums. It is contended that the whole of the consideration should have been stated in the declaration. The objection was overruled, and the policy given in evidence to the jury. This is the subject of the first exception.

The policy of insurance, thus admitted in evidence, contained, among other matters, the following provisions:

"This policy, issued by the company and accepted by the insured and the holder thereof, on the following express conditions and agreements:

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"1st. That the statements and declarations made in the application for this policy, (*which application is hereby made a part of this contract,*) and on faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health, habits, or circumstances of the person insured, affecting the interests of said company." * * *

"5th. That in case of the violation of the foregoing conditions or agreements, or any of them, this policy shall become null and void, all payments made herein shall be forfeited, and the company shall not be liable for the payment of the sum insured, or of any part thereof; that in case the insured shall die by his own hand or act, *voluntarily or otherwise*, or in consequence of engaging in a duel, or in consequence of violating any law of any nation, state, province, or municipality, this policy shall become and be null and void, and the company will not become liable for the sum insured."

The defendant admitted that all the premiums down to August 27, 1872, had been paid as they fell due, and the plaintiff then called W. P. Dunwoody as a witness, who testified that he had been the defendant's agent for several years at Washington.

The following receipt was then shown the witness by plaintiff's counsel:

"NATIONAL LIFE-INSURANCE COMPANY OF THE UNITED STATES OF AMERICA, BRANCH OFFICE, PHILADELPHIA.

"Policy No. 15553.

"Premium, \$57.40.

"WASHINGTON, D. C.,

November 27, 1872.

Received \$57.40, which continues in force policy No. 15553 on the life of Edward N. Jacobs for three months from date, until the 27th of February, 1873.

J. M. BUTLER, *Secretary.*"

"*Notice to policy-holders.*—For terms of mutual agreement, see application and policy. Receipts, to be valid, must be signed by an officer of the company. Agents should countersign receipts sent to them for delivery, as evidence of payment to them. Agents cannot make binding, or continue any policy; nor can they make, alter, or discharge contracts,

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or waive forfeitures, or bind the company in any way. When notices are sent to policy-holders that their premiums are about to become due, they are sent solely from courtesy, and not as an obligation of the company, which will be responsible neither for their sending nor their miscarriage. Any extension of time by an agent for the payment of premiums is without the authority of the company, and will in no way enlarge or extend its liabilities under the policy.

E. A. ROLLINS,
President."

(Across the face :) "This payment, if made when overdue, will not be valid in continuing the policy, unless the party insured is in good health at the time.

Countersigned by

W. P. DUNWOODY,
Agent at Washington, D. C."

And the witnesses testified that said receipt was the receipt of the defendant, and that he, the witness, as the agent of the defendant, gave said receipt to the insured, who had previously paid him the premium, the receipt of which is thereby acknowledged.

On cross-examination, Mr. Dunwoody said that the premium due on said policy was not paid till the 28th day of December, 1872, on which day he delivered said receipt to the insured.

On his redirect-examination Mr. Dunwoody stated that he had authority to accept an overdue premium on a policy, and thereby continue the policy in force, at any time within thirty days or within a month after the premium fell due.

The counsel for the defendant then admitted to the jury that Edward N. Jacobs, whose life was insured by said policy, died on the 19th day of January, 1873; that proof of his death was furnished the defendant by the plaintiff, in accordance with the requirements of said policy and as stated in the declaration in this case; and that the plaintiff, as the mother of the insured, had an insurable interest in the life of insured. And there the plaintiff rested.

The defendant's counsel requested the court to instruct the jury that, on the evidence, the plaintiff was not entitled to a

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verdict, on the ground of the variance already mentioned; and, also, because the contract declared on is an absolute one, and the policy in evidence is upon the condition that the statements made in the application are in all respects true, and made a part of the contract, and should, therefore, have been set forth in the declaration, and the truth thereof established by the plaintiff to entitle her to recover. But the court refused to give said instruction, and defendant's counsel excepted.

The defendant put in evidence the application referred to in the policy, and proved a number of facts tending to show that the insured laid down at night under a tree in the open grounds adjacent to the Smithsonian Institution, in the city of Washington, during the prevalence of very cold weather, where he was found about five o'clock p. m. on the 18th day of January, 1873, frozen to death.

The defendant closed its testimony, and the plaintiff called A. R. Jacobs, brother of the insured, who testified in regard to the disappearance of the insured; and that a policeman notified him of the finding of the body next morning, just as he was dressing to go out and look for his brother.

On cross-examination, Mr. Jacobs was asked whether he had ever known the insured to stay away all night before, and replied that he could not recall any particular instance. He was then asked if he recollected of the insured having ever gone to Arlington and staid all night, and replied that the insured, in August, 1872, started to go to Arlington, and remained away all night; that witness and the plaintiff were very uneasy about him on that occasion; that in the morning witness went to the Treasury Department and learned when the insured had left there; that witness then returned home and found the insured there. The witness was then asked by plaintiff's counsel this question:

"Did he tell you how he came to stay out all night?" and he replied "Yes, sir." He was then asked by plaintiff's counsel: "What did he say induced him to do it?" To which last-mentioned question the counsel for the defendant objected, but the presiding justice overruled said objection, and directed the witness to answer the question, which he did. The defendant's counsel excepted to this ruling of the court.

The testimony being closed, the counsel for defendant prayed the court to instruct the jury that their verdict must be for the defendant, because a different contract had been proved from that alleged in the declaration, and that the burden of proof is on the plaintiff to prove the truth of the statements and declarations contained in the application for insurance introduced in evidence and forming part of the policy, and failure to adduce evidence in support of the statements and declarations is fatal to the plaintiff; but the justice refused to give such instructions, saying to the jury, "There has been no proof on that subject. I refuse to give that instruction." To which ruling of the court the counsel for the defendant excepted. The court then charged the jury, among other things—

"GENTLEMEN: The defense in this case is that the party whose life was insured by this policy came to his death voluntarily and by his own act; in other words, that he came to his death by suicide; and if that defense is established, it will defeat any recovery in this case, and the verdict will be for the defendant. That is the only defense interposed here, and, unless it is established by the testimony in the case your verdict will be for the plaintiff.

"Now, it does not matter what means a party adopts to terminate his existence, whether it is by violent exercise or by exposure (as is alleged to have been the cause of death in this case) to the elements. If the party lay down there with the purpose of ending his life, that would be suicide. If, overcome by drowsiness, he became insensible, and without any intention or design of taking his life he lay down there, it would not be suicide. So that you must arrive at the conclusion, from the circumstances in the case, in order to uphold the defense, that he intentionally laid down there for the purpose of ending his life. If he lay down there for some other cause, independent of any such intention, the defense is not made out.

"The amount to be recovered, if you find for the plaintiff, will be the amount of the policy, together with the premiums, and with interest from the time of the proof of the death."

And the following portions of said charge were duly excepted to :

"The ~~only~~ defense in this case is that the party whose life was insured by ~~this~~ policy came to his death voluntarily and by his own act. To uphold this defense, you must arrive at the conclusion from the circumstances in the case, that the insured intentionally lay down, where he was found dead, for the purpose of ending his life. If he lay down there from some other cause, independent of any such intention, the defense is not made out."

The jury returned a verdict in favor of the plaintiff, and the case is now here on the exceptions.

I. G. Kimball and R. T. Merrick for plaintiff.

Edwin L. Stanton and A. S. Worthington for defendant.

Mr. Justice MACARTHUR delivered the opinion of the court:

The declaration in this case is upon a policy of insurance issued to the plaintiff, whereby the defendant insured the life of her son, Edward N. Jacobs, for her benefit, in the sum of \$5,000.

The consideration is stated to be the payment, by the plaintiff to the defendant, of the sum of fifty-seven dollars and forty cents quarterly. The policy, which was offered in evidence at the trial, expresses that it was made in "consideration of the representations and declarations made to it in the application therefor;" and also of the due payment of the premiums just mentioned. The defendant objected to the introduction of said policy in evidence, on the ground that there was a variance between it and the policy set up in the declaration, inasmuch as it did not state the entire consideration. It is admitted that the representations and declarations which constituted the application had been furnished the defendant before the policy issued. It was, therefore, an executed part of the consideration. The risk of the insurers was intended to be undertaken on the unexecuted part of the consideration, which was the payment of the premiums as they should fall due. We are therefore inclined to the opinion that there was no such variance as would defeat

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the action. *Pillman vs. Fuller*, 13 Mich., 113; 15 Gray, 249; May on Ins., 235, 98 Mass., 381; 1 Chitty Pl., 299. The objection that the application presented to the defendant, when the insurance was effected, is not set forth in the declaration, must be disposed of in the same way. It is no part of the plaintiff's cause of action. If the representations were untrue there could be no recovery. But we all think it is for the defendant to falsify them, and not for the plaintiff to prove their performance in the first instance. Besides, we are inclined to hold that it is sufficient to declare generally in this way upon a policy of life-insurance. It not only avoids great prolixity, but relieves the trial from numerous embarrassments growing out of alleged variances. It is also in conformity with the simplified forms of pleading recognized by our own rules, and therefore is to be upheld. *Fowler vs. Insurance Company*, 15 Gray, 249; *Life and Fire Insurance Company vs. Johnson*, 4 Zabriskie, 676; S. C., 1 Big., 327; *New York Life-Insurance Company vs. Graham*, 2 Duvall, 506; S. C., 1 Big., 114.

The third exception is upon the point whether the payment of the overdue premium revived the policy. The receipt is dated on the day the premium was due, and the agent of the company, who was examined as a witness, stated that he delivered it to the insured who had previously paid him the money, and that he had authority to accept a premium at any time within thirty days or a month after it fell due. But it is alleged that that period expired on the 27th of December, or one day before he received the money and gave the receipt. The receipt itself is executed with all the formalities required by the policy. Without going into a computation of time to ascertain whether the period within which the agent could receipt for the premium had expired, we are satisfied that the facts stated constitute a re-instatement of the policy. It is true that the policy is to cease as a liability upon the defendant if the premium is not paid as it becomes due; and it is also true that the defendant's agents have no power to waive the conditions that are expressly stipulated for. It is, nevertheless, competent for defendant to waive forfeitures, so as to give renewed effect to the contract.

In the case of *Bonton vs. The Fire-Insurance Company*, decided by the supreme court of Connecticut, the court employ the

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following language in speaking of a condition of this kind: "But that as that provision was inserted for the sole benefit of the defendants, it is only voidable at their election, and that it was, therefore, competent for them to waive a strict compliance with it after the time stipulated for the payment of such premium; and that in case of such waiver the policy would be revived, and continued obligatory on the defendants on its original terms; and further, that the reception, by them or their authorized agent, of the premium for that purpose, after that time, would have the effect of reviving and continuing the contract evidenced by the policy as though it had been strictly complied with by the insured. The authorities in support of this opinion are so numerous, uniform, and explicit, and the reasons for it are so fully and satisfactorily given in them, that we deem it sufficient only to refer to them. *Winy vs. Harvey*, 27 Eng. L. and Eq., 140; *Buckber vs. United States American Insurance and Trust Company*, 18 Barb., 541; *Sheldon vs. Connecticut Mutual Life-Insurance Company*, 25 Conn., 207; Angell on Insurance, sec. 213, and note, sec. 343." We recognize this authority as settled law and as entirely decisive of the point under consideration. To allow the company to treat the policy as at an end, in view of the fact that they have received the consideration for renewing it, would be to suppose a singular degree of license from the ordinary obligation of a contract.

Another point in the case is that hearsay evidence was allowed to go to the jury. This has reference to the testimony of A. R. Jacobs, a brother of the deceased, who was permitted to testify what he heard his brother say as to his having staid away from home all night in the month of August, 1872. The fact of his remaining from home all night was drawn out on the cross-examination by defendant's counsel; and the plaintiff's counsel then asked, "What did he say induced him to do it?" The answer would be clearly hearsay, unless the door was opened for its introduction by cross-examination, and we are inclined to think that such was the case. The fact of his brother's absence in the night-time had been particularly inquired into on the other side, and the communication made to the witness was explanatory of that circumstance. At least it appears to be sufficiently responsive to the new matter to justify its admission.

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It remains only to consider the last exception, which is to the instruction of the court upon the meaning of the clause of the policy which declares that it shall be null and void in case the insured shall die by his own hand or act, "voluntarily or otherwise." In the charge of the court, the jury were instructed that in order to sustain the defense they must believe from the testimony that the insured intentionally lay down, where he was found dead, for the purpose of ending his life. It must be admitted that this part of the charge was correct, unless the word "otherwise" makes any act not willful or intentional by which the insured may take his own life a forfeiture of the insurance.

The counsel for defendant admitted that the courts had decided that, although the language of the policy avoided it, in case the insured shall die by his own hand or act, yet if he committed the act of self-destruction under the influence of insanity the company would still be liable. In order to meet this interpretation the defendant inserted this term "otherwise," so that they would be exonerated if an insane man took his own life. But the word is not used in this limited sense. It can be reasonably and naturally understood as embracing every species of self-destruction, whether intentional or accidental, caused by the act or hand of the insured. If the act is by his own hand it is only necessary that it should be voluntary or otherwise in order to avoid the insurance. There is nothing in the ordinary or popular acceptance of the term which would limit its sense only to mean insanity. It is admitted that such was not the understanding of the company, and that this construction would defeat the intention of both parties; and probably no court in America would undertake to enforce a provision so dangerous and uncertain. If the defendant desires to contract that death by insanity shall invalidate the policy, they can easily adopt terms to express that intention. Meanwhile we think that no stress is to be laid upon the use of a word so vague and intangible, and so impracticable in its application. Besides, there is no direct testimony of insanity in the case, and no jury in the world that were not themselves crazy would have been warranted in considering the subject.

We think the court below construed the policy properly, and the judgment must be affirmed.

**THE ADAMS EXPRESS COMPANY vs. ANDY M.
ADAMS, A. H. JACKSON, AND A. J. WILLIAMS.**

IN EQUITY.—No. 3654.

- I. Upon a bill of interpleader where the fund in dispute has been assigned, and had been collected by the complainants upon a draft in favor of the assignee, and on his account, it was held that he was entitled to the money against his co-defendant, who claimed it upon the ground that he had an attorney's lien upon the fund.

STATEMENT OF THE CASE.

Bill of interpleader exhibited by Adams Express Company to determine which of the defendants were entitled to the amount of a draft which had been sent to them from California. The complainants have no interest in the fund aside from paying it to whom it belongs. The claim of the defendant Jackson arises under the following circumstances:

It appears that one Eldridge Gerry had a claim against the United States for Indian depredations, and that he employed the defendant Adams to prosecute it, together with several other claims. It seems that Adams placed these claims in the hands of Charles Ewing, of Washington City, for collection, upon an agreement that the fees in the cases should be divided between him and said Ewing, he to have one-third and Ewing two-thirds; that Ewing not having time to give his attention to the business the defendant Jackson was also employed to attend to said claim before Congress, for which he was to receive from Ewing two-thirds of his part of the fees and one-third from Adams. That when the amount of this particular claim was allowed, Jackson's fee amounted to one thousand dollars, of which Ewing paid two-thirds, leaving \$333.33½ due him from said Adams. That about the time that the Gerry claim was collected, knowing that it was to be paid, and exactly what amount was coming to him, he, Adams, assigned his portion of the fee in that case to A. J. Williams, to whom he was indebted for a larger sum than was so coming to him, and by power of attorney duly made for

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that purpose empowered Williams to draw in conjunction with Gerry for that amount on said Ewing; that accordingly two drafts were drawn, one by Eldridge Gerry alone, and the other by Gerry and Williams jointly, on Charles Ewing, and, together with a power of attorney from Williams authorizing Ewing to receive the money from the United States, and another from Adams, authorizing Williams and Gerry to draw jointly for the portion of said claim belonging to him, Adams, were placed in the hands of Adams Express Company for collection; that the drafts were paid by Ewing, the one drawn by Eldridge Gerry in a draft on New York, and the other drawn by Gerry and Williams in currency. Jackson then commenced the suit against Adams, mentioned in the opinion of the court, and garnisheed the fund in the hands of the complainants collected by them upon the draft of Gerry and Williams. Adams denies that he ever employed Jackson, or ever agreed to pay him any part of his fee in the case; and further he claims that he assigned his share of the fee to Williams in payment of a just debt, and that Williams accepted such payment in good faith. These are all the facts necessary to be stated in addition to those set forth in the opinion.

W. B. Webb for complainants, and also attorney for defendant Williams:

The claim of Jackson to the fund in controversy, as shown by the proceedings in the case, arises thus: He was employed, as he says himself, by Ewing and Adams to assist them in the prosecution of the case of Eldridge Gerry, and for his services in that behalf he was to have a portion of their fee. It is contended that Jackson has a lien upon Adams's share of the fee; and the theory of Jackson seems to be that, notwithstanding the fact that Adams has assigned this interest of his, the lien follows the fund, and the assignee takes it *cum onere*.

It is submitted that not one of the elements of an attorney's lien subsists here. That lien always attaches, when it attaches at all, to the fund collected, and then only when the fund comes into the hands of the attorney himself. It can-

not be made to apply to the case under consideration, where the fund is not the fund really collected, but merely the share of one of the attorneys engaged in prosecuting the claim. Jackson had nothing to do with collecting Adams's fees. He had only an agreement with Adams that he was to have a part of the fee coming to him, Adams, out of the fund collected.

Adams denies that he ever employed Jackson, or ever agreed to pay him any part of his fee in the case, and, on the contrary, swears that he assigned his share of the fees in the case of Eldridge Gerry to Williams in payment of a debt he owed Williams, in perfect good faith, and that Williams accepted it in good faith. Williams's title to the money is perfectly made out, and the fact cannot be doubted that Ewing paid the money upon the draft of Williams, drawn upon him by virtue of a power of attorney delivered to him with the draft, and therefore with a perfect knowledge of the transfer made by Adams.

Moore and Newman for defendant Jackson :

It is respectfully but earnestly contended by your appellant, A. H. Jackson, that the court below erred in passing the above decree, and in refusing to allow his claim to be paid out of or from the funds attached and garnisheed in the hands of the plaintiff, and in support of this the following points and authorities are submitted :

Attorneys at law and solicitors in equity have, undoubtedly, by the English rule, a *general lien* not only upon all moneys collected by them, but upon all books, papers, and documents of their clients in their possession, not only for all their charges and costs in the particular cause in which they came to their possession, but also for other professional business; and this lien extends to all moneys received and judgments recovered.

The same rule is almost universally applied in the several States of the Union for the protection of the bar generally, and the Supreme Court holds to the same doctrine. For an exhaustive *résumé* of this doctrine, and of the various eminent authorities advocating it, see T. W. Dwight in *American*

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Law Register, vol. 10, or vol. 1, new series, 414; also, *Ex parte Plitt*, 2 Wallace, jr., 453; *Pinder vs. Morris*, 3 Caines, 165; *Martin vs. Hawks*, 15 Johnson, 405; *St. John vs. Diffendorf*, 12 Wendell, 261; *Bradt vs. Koon*, 4 Cowen, 416; *Hutchinson vs. Pettes*, 8, id., 614; *Gammon vs. Chandler*, 30 Maine, 152; *Frost vs. Belmont*, 6 Allen, 152; *McDonald vs. Napier*, 14 Georgia, 99; *Patten vs. Wilson*, Penn. State, 299; *Pittmann's case*, 1 Curtis, 186; *Casey vs. March*, 30 Texas, 180; *Wylie vs. Coxe*, 15 How., 415.

Mr. Justice OLIN delivered the opinion of the court:

This cause comes before us on appeal from a decree of the justice holding the special term. A bill was filed, commonly known as a bill of interpleader, under the following circumstances.

Jackson, one of the defendants, brought a suit at law against the defendant Adams to recover a sum of money which he claimed to be owing to him from Adams.

Upon the commencement of such suit Jackson made affidavit that Adams was a non-resident of this District, obtained a writ of attachment against certain funds in the hands of the complainants, the Adams Express Company, which he claimed was collected by said company for and on account of A. M. Adams. The company was summoned as garnishee, and upon interrogatories answered it had no funds in its hands belonging to the defendant A. M. Adams.

The justice holding the circuit refused, on motion for that purpose, to quash the attachment, and the case between Jackson and Adams was tried, a verdict found for Jackson for the amount of his claim. In the mean time Williams, the other defendant, intervened and claimed the fund attached as belonging to him, and that his right to the fund might be determined in the suit at law then pending before the court. This, says the record, the court refused to do, and advised that a bill of interpleader be filed on the equity side of the court, and refused to take any action as to the fund in the hands of the express company, the present complainants.

Accordingly a bill of interpleader was filed by the complainants; and on the hearing of the cause in the equity

court upon pleadings and proof, it appeared that prior to the levying of the attachment on this fund in the hands of the complainants a draft had been drawn by A. M. Adams in favor of Williams for the amount of the funds in its hands, and by the company accepted.

This transaction operated as an assignment of the fund to Williams, and therefore the express company had no funds in its hand belonging to A. M. Adams. Jackson rests his right to the fund in question upon the ground that he had what is called an attorney's lien upon this fund, having aided, by his services as attorney or counsel, Adams in obtaining it. But as the fund never came into Jackson's hands, he had no lien upon it for his fees, possession being the necessary prerequisite to the operation of such a lien, except in some exceptional case where there is a concurrence of circumstances such as existed in *Child vs. Trist, ante*, page 1, decided at a former term of this court.

The decree of the court in special term should be affirmed.

ROBERT K. ELLIOT, TRUSTEE, ET AL. VS. WARD
H. LAMON ET AL.

IN EQUITY.—No. 3509.

- I. A bill in equity which seeks to set aside a conveyance of real property by which one of the defendants became possessed of an estate *per autre vie*, and which also seeks to charge the same defendant with the taxes assessed upon the property, is not multifarious, but a proper form of pleading for the purpose of economy in litigation.
- II. It is the duty of the person who owns the estate *per autre vie* to keep the property in repair and pay the taxes as they fall due, and if he fails to perform this obligation the court will decree the taxes due and unpaid a lien upon the life-estate, and will order the sale thereof in case of his default to pay such taxes within a specified period.

R. K. Elliot for complainants.

W. D. Davidge and *Nathaniel Wilson* for defendant Lamon :

I. The complainant's bill is multifarious.

a. It seeks to have the purchase by which the defendant became possessed of an estate *per autre vie* set aside and declared void.

b. It seeks to charge the owner of said estate obtained by said purchase with certain taxes and assessments.

These matters are several and distinct.

Daniel's Chancery, vol. 1, p. 350, and cases cited.

II. The decree declaring the taxes and assessments a lien on the estate of the defendant is erroneous.

a. Because no injury for which a court of equity can afford a remedy has resulted or can result to the complainants, inasmuch as it is the law "that when the estate of the tenant in default, as for years or for life or lives, shall be sufficient to defray the taxes chargeable thereupon, such estate only shall be liable to be sold under the provisions of this act." Act of May 17, 1848, sec. 7 ; Watts's Digest, p. 501.

b. Because the lien for taxes is not such a one as a court of equity can enforce at the instance of the remainder-man.

c. Because the remainder-man can only invoke the aid of a court of equity when the owner of the life-estate has neglected to pay the taxes, after the remainder-man has paid the taxes and thus created a lien in his own favor.

III. If the complainant has a right to any relief, he is to be *indemnified* for any loss or liability that may occur by reason of the non-payment of taxes.

Mr. Justice WYLIE stated the case, and delivered the opinion of the court:

Previous to the rebellion, Cornelius Boyle was a citizen of the District of Columbia, and owner of the property in controversy. In consequence of his active participation in that cause, his life-estate was confiscated and sold at the instance of the Government. At this sale John Van Riswick was the purchaser. Subsequently Van Riswick conveyed the interest so purchased to Ward H. Lamon, the marshal by whom the sale was made.

The war having ended, Boyle returned, was pardoned by the President, conveyed all his right, title, and interest in this property to certain trustees for the benefit of his wife and children. The interest and estate of those trustees is, however, now vested in Elliot, one of the complainants.

Complainants claim that the sale made by Lamon, as marshal, to Van Riswick was void, as having been made in pursuance of an arrangement previously entered into, as they charge, under which Van Riswick was to purchase the property and hold it for the benefit of Lamon.

But this feature of the bill requires no further consideration in this place, for the reason that the court below was of a different opinion upon the evidence, and so decided, and from that decision the complainants have not appealed. The validity of Lamon's title to an estate in the property during the life-time of Cornelius Boyle is therefore to be here regarded as out of the controversy.

It is further stated in the bill that, since Lamon claims an estate in the property *per autre vie* under the confiscation sale, and as the inheritance is vested in the complainants, Lamon should be required to keep the property in repair, and

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meet the taxes as they fall due, and that, in these respects, he has failed to perform his obligations, for which relief is prayed.

It is objected that the bill is thus for several and distinct matters, and ought not to be sustained. But we consider the objection to be without any solid foundation. The bill is in the alternative, and seeks appropriate relief, according as the result may turn out to be, after the cause should be heard upon the proofs and the law; and this is not objectionable, but a common form of pleading, and, indeed, necessary for the purpose of economy in litigation. .

It appears by the testimony that the property has been yielding a rent of about \$600 a year, but that Lamon has been very negligent about paying the taxes; and that, since it has been in his possession, it has been sold at least twice in consequence of this neglect; and that at the time of filing the bill a considerable amount of taxes, both general and special, were in arrears unpaid.

The court below passed a decree requiring the defendant Lamon to pay the amount of general taxes which were due and unpaid at the date of filing the bill, and decreed a sale of his interest, in case of his default for a period of thirty days.

It has been urged here that this decree was erroneous for the reason that the complainant's estate in expectancy is, and can be, in no jeopardy from the default of the tenant for life as to paying the taxes upon the property, because his life-estate is all that could be sold in consequence of such neglect; and we are referred to the last proviso of the 10th section of the charter of 1820 as authority for this proposition. That proviso is in these words: "And provided moreover that where the estate of the tenant in default, as for years, or for life, or lives, shall be sufficient to defray the taxes chargeable thereupon, such estate only shall be liable to be sold under the provisions of this act."

By other preceding provisions of this law the land itself, without respect to the several interests which might be carved out of it, was made subject to taxation and liable to sale in case the taxes were unpaid. This proviso is, in our judgment, entirely consistent with those other provisions of the act. If the life-interest be "sufficient" to pay the taxes,

nothing more shall be sold. But how would it be if the life-interests were not sufficient? Clearly, the collector was in that case required to sell the land itself and make an absolute fee-simple title to the purchaser. The value of a life-estate, in consequence of age or infirmity, might be much less than the amount of taxes; or where these obstacles were not present the uncertainty of its duration, at best, might prevent a sale. In either of these cases the collector has authority to sell the whole estate. It is not unlike the case of the owner of several lots, one of which has been sold for enough to pay the taxes on all. There the collector can sell no more than the one. That does not prove, however, that the tax assessed to each is not a lien upon each. In the present instance, the aggregate sum of the general taxes in arrear and unpaid, together with the legal charges and interest, was \$1,022.62. The annual rent from the property has been \$600.99, without allowance for repairs or insurance. It is quite improbable, we think, that the life-interest owned by the defendant in this property would bring at a tax-sale the amount of the arrears. The life-interest vested in the defendant is not an interest for his own life, but for that of Cornelius Boyle.

It is manifest, therefore, that if these arrears of taxes which have been accumulating since 1865, and each year with an increased ratio, are to remain unpaid by the tenant for life, and increase from year to year, the whole burden may ultimately fall upon the estate of these complainants.

There is no question as to the personal liability of the defendant to meet these charges. He is the owner of a life-interest in the property, and is in the enjoyment of its rents and profits, which are considerable. The life-estate is precarious at least, becoming every day less and less valuable, and the interests of those in expectancy require immediate and adequate protection.

That a court of equity possesses jurisdiction to apply the remedy in such a case as the present is not to be doubted. In 1 Story's Eq., secs. 483 and 484, the author says: "But a more beneficial exercise of equity jurisdiction in cases of apportionment and contribution is in cases where incumbrances, fines, and other charges on real estate are required to be paid

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off, or are actually paid off, by some of the parties in interest.” “This may be illustrated by one of the most common cases, that of an apportionment and contribution toward a mortgage upon an estate where the interest is required to be kept down, or the incumbrance paid.” So in Smith’s Manual of Equity, 340, it is said: “An apportionment may be made either of a benefit, or of an incumbrance, loss, expense, or liability ; and in case of apportionment of the latter class, a corresponding contribution is enforced consequent upon such an apportionment.”

In the present instance, the District of Columbia is one of the parties defendant, the amount of the incumbrance is ascertained, the liability of the defendant for its payment is not disputed, and the contribution may and, we think, ought to be enforced.

Decree affirmed.

**TUCKER & SHERMAN vs. JAMES M. ORMES AND
CATHARINE SHYNE.**

- I. Testimony of witnesses tending to show an alteration in the name of the grantee in a conveyance of real property will not affect the validity of the deed when no such alteration appears upon its face, and when it is evident that the witnesses are laboring under an obvious and palpable mistake.**
- II. A mechanic's lien under our statute begins only from the time of filing the notice, and a purchaser at any time before such notice is filed takes a good title.**

STATEMENT OF THE CASE.

The complainants, Tucker & Sherman, filed notice of a mechanic's lien on the 20th day of January, 1872, and in the following August commenced this suit to enforce the same, and in December a decree was passed under which the trustees sold lot 235, in Gilbert's subdivision of square 675, in the city of Washington, to said Tucker & Sherman. The materials in the account of the complainants were furnished the defendant James M. Ormes, for the construction of eighteen buildings, one of which was situated on the above-mentioned lot.

For the purpose of setting aside the decree and the sale under it, Catharine Shyne intervened with her petition in said suit, on the 6th day of January, 1874, upon the ground that she had purchased the property from the said James M. Ormes on the 25th day of September, 1871, and before the complainants had filed their notice of lien. In their answer to this petition the complainants deny the conveyance to Mrs. Shyne, and state that on or about the first of August, 1871, the said defendant James M. Ormes was the owner in fee of the premises described in said petition and was engaged in erecting buildings thereon, and that during said month of August the said Ormes purchased of these plaintiffs certain materials for said buildings and continued to purchase such materials as he needed for the construction of said buildings from time to time until the following January, when the pur-

chase by said Ormes of materials for said houses from said plaintiffs, and which were used in the construction of the same, amounted to the sum of about three thousand nine hundred and seventy-one dollars, all of which remained unpaid except the sum of about thirteen hundred and forty-seven dollars, leaving a balance due these plaintiffs of about twenty-six hundred and fourteen dollars, for which last sum these plaintiffs on the 20th day of January, 1872, filed their lien against said lots, and subsequently such proceedings were had as resulted in the sale of the lots and improvements as stated in said petition.

The facts are, as shown by the evidence, that Mrs. Shyne was the owner of part of a lot on F street in said city of Washington, and that said James M. Ormes owned three lots on K street, and among them the one now in controversy. B. F. Gilbert entered into an agreement with Ormes some time in September to exchange certain property for three lots. Some time in November following Gilbert agreed with Mrs. Shyne to exchange these lots for the property which she owned on F street, and in order to save a multiplicity of deeds it was arranged that Ormes should convey direct to Mrs. Shyne, which was accordingly done. The consideration paid by Mrs. Shyne was the sum of \$22,500, and the deed from Ormes to her was not actually delivered until the 11th day of December, 1871, which would be upward of five weeks before the mechanics' lien was filed. The complainants claim that the deed from Ormes was first made out to Gilbert, and that there was an erasure of Gilbert's name as grantee, and that of Catharine Shyne inserted in his stead; but the deed was produced, and it shows no such alteration on its face, and no erasure has been made in the grantee's name. Upon this showing the court below set aside the sale, and the case is now here on appeal from that decree.

J. Daniels for complainants.

N. F. Cleary for Mrs. Shyne.

By the COURT:

We think the decree setting aside the sale ought to be affirmed. The complainants' notice of lien was not filed in

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the clerk's office until upwards of five weeks after Catharine Shyne had purchased the property for a large consideration. She was, therefore, the owner of the title long before Tucker & Sherman had any lien whatever. We repeat our ruling made at the last general term, to the effect that a mechanic's lien under our statute begins only from the time of filing the notice, and that a purchaser at any time before such notice is filed takes a good title. *Cotton et al. vs. Holden, ante*, page 463.

We also hold that the testimony of witnesses tending to show an alteration in the name of the grantee in the conveyance to Mrs. Shyne does not affect the validity of the deed, as no such alteration appears upon its face, and it is also evident that the witnesses are laboring under an obvious and palpable mistake of fact.

Decree affirmed.

WM. V. J. MERCER vs. SOPHIA L. MERCER.**IN EQUITY.—No. 3383.**

- I. Where a final decree in an equity suit does not conform to the decision, the proper method to have such decree corrected is by motion for a rehearing.**
- II. In a suit for a divorce the court can grant a rehearing for the purpose of conforming the decree to the decision at any time before the end of the next term, under the 87th Rule in Equity of this court.**

STATEMENT OF THE CASE.

A bill was filed by the complainant for a divorce from the bond of matrimony; an answer was interposed and proofs were taken, and after the cause was heard upon bill, answer, and proofs, the justice made the following order:

“This cause comes on to be heard on this the 25th day of June, 1874, on the bill, answer, replication, and proofs, and thereupon it is ordered, adjudged, and decreed that the bill be dismissed and the complainant pay the costs.”

On the 25th day of July, during the next special term, a petition of review was filed, the material part of which is a statement that the decree actually signed and entered of record was inadvertently signed in the words before quoted, when in fact the justice announced orally from the bench, when he decided the case, that the bill should be dismissed without prejudice.

The further fact is asserted that the complainant had further testimony which she might have offered, but was advised that she had proven enough.

This petition was answered by the defendant substantially putting in issue the facts above mentioned, and upon hearing this petition and answer read, the justice made the following order:

“This cause came on to be heard at this term, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the decree passed June 25, 1874, in this case be, and the same is hereby, set aside, and that the petition for

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divorce be and the same is refused without prejudice, and that the defendant pay the costs."

At the rehearing Mr. Justice Wylie made the following remarks, which the court here considers an important part of the record:

"The recollection of the court in regard to this matter is perfectly distinct. The testimony is voluminous, and it presented on the whole such a case as ought to justify the separation by the wife from her husband. The husband was unable to maintain his wife, much less his children; scarcely himself; and dissensions had grown up between husband and wife. Yet the court did not find in the act of Congress authority to divorce this couple on account of the poverty of the husband and his inability to support his wife; and on that ground alone it was with great reluctance compelled to dismiss the petition. Some features looked very strongly to a contrary decision, and, without regard to the statement of petitioner's counsel as to testimony not taken, the court was not disposed to shut the door forever against the wife in this case. Sometimes from an inadvertence all the testimony is not taken that might be, and possibly here in a new suit that testimony would change the balance, for but little more testimony is necessary to change the result.

"For this reason the court dismissed the bill without prejudice. The court supposed the clerk took down the substance of the decree, and afterward when the decree was drawn up it supposed it was in accordance with the clerk's minutes. It ascertained afterward that the decree had omitted a very material part of the decision. I am inclined to think the court would have power to correct such an error; an inadvertence of the court or of the clerk, or perhaps both. I think, for the purpose of carrying out what was intended, we ought not to construe the rule strictly against the petitioner. This is an equity rule, and to be construed for the promotion of equity. Governor Stanton says if it is to be interpreted as I have intimated, it would allow a rehearing in every case. But when you take the terms of the rule, the court finds no difficulty in seeing what goes to the Supreme Court of the United States and what not. In all cases where an ultimate appeal lies to the Supreme Court of the United States, we are pro-

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hibited from a rehearing. In divorce cases, however, no such appeal lies, and consequently they can be reheard on a motion under this 87th rule. The decree will be set aside, and a decree passed conforming to the decision."

From the last decree the defendant appeals to this court.

R. D. Mussey for complainant.

Fred. P. Stanton for defendant.

Mr. Justice MACARTHUR stated the case, and delivered the opinion of the court :

At the special term, held on the 25th day of June, 1874, this case was heard upon the pleadings and proofs, and a decree passed dismissing the bill at complainant's cost. On the 25th day of July following, which was before the end of the next term of the court, the complainant filed a petition stating that when Mr. Justice Wylie, who heard the case, announced his decision dismissing the bill the counsel for complainant informed said court that he had additional evidence which he regarded as important to his client, but that he omitted to produce it for the reason that, in his judgment, he had proved enough; that thereupon the court said the bill would be dismissed without prejudice. It is further stated in said petition that the decree which was prepared by defendant's counsel and signed by the court, instead of conforming to such decision dismissed the bill generally with costs against plaintiff, and that such decree was signed inadvertently and does the complainant injustice, and the petition then prays the court to review and revise the same, so as to conform it to the decision orally expressed by the said court.

On the 4th of August the defendant filed his answer to the bill of review. This answer alleges that the decree of the 25th of June was drawn according to what the defendant's solicitor understood was the order of the court, and that said solicitor was informed by the justice that he had signed the decree as written, and that no intimation was given that the bill was to be dismissed without prejudice.

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The answer also insists that the facts stated in the petition of review do not justify any rehearing, and that the decree as recorded was just and right on the proofs in the case, and asks for the same advantage by this answer as might have been had by demurrer.

On the 6th of August the decree of the 25th of June was set aside, and it was ordered, adjudged, and decreed "that the petition for divorce be and the same is hereby refused, without prejudice, and that the defendant pay the costs."

From this decree an appeal is taken by the defendant in the court below.

We desire in the first place to make an observation upon the practice adopted by the complainant's solicitor in presenting this matter to the court below. He styles it a petition of review, and asks for a review of the decree. There is no proceeding in this form known to our practice. The relief asked for can only be obtained on a motion for a rehearing, (2 Daniel's Ch., 1233,) and this is expressly provided for by the 87th equity rule of this court. A bill of review is a collateral suit, and lies after the first decree is enrolled, and is founded upon an averment of newly-discovered evidence, or for error in law appearing upon the face of the decree complained of. The petition here does not purport in this sense to be a bill of review, but simply seeks to have a decree corrected, so that it will conform to the decision. The proper method to accomplish this is by applying to have the case reheard. 2 Daniel's Ch. Pr., 1232; *Burch vs. Scott*, 1 Bland, 120; *Clark vs. Hall*, 7 Paige, 382. But as it appears the application was presented to the special term, as it certainly was here, as if it were a motion for rehearing, we will consider it in that light, especially as it was evidently intended to be a motion of that character. These remarks are made now that the practice may not be drawn into precedent hereafter.

It appears from the statement of the case that the justice holding the special term on the 25th of June, 1874, announced his decision orally, dismissing the bill without prejudice. No minutes of the decree were taken by the clerk. Afterward the defendant's solicitor, who understood that the bill was dismissed without any qualification, drew up a decree to that

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effect, which was signed by the court. The counsel for petitioner, as a reason for not preparing the decree, states that he supposed the clerk would make an entry of the opinion of the court, and that he was called out of town in the evening. It will be seen that his statement, that the bill was dismissed without prejudice, is confirmed by the remarks of the justice in granting the rehearing.

On the part of the defendant it is contended that the special term has no authority to make an alteration in the decree of the 25th of June, after the term at which it was signed. It is well settled in chancery practice that an application to alter or modify a decree after the adjournment of a term will not be entertained.

If the party is entitled to relief, he must then resort to a bill of review. In case, however, of a mere formal or clerical error, the court can correct it even though the term has expired, but with this exception all the authorities concur in the position just mentioned. The 87th Rule in Equity of this court has changed this principle in chancery practice to a limited extent; it reads as follows:

“Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.”

Now, as we have seen, the first decree was signed on the 25th of June, and the petition was filed before the end of the next term of the court. It follows, if this is a case in which no appeal lies to the Supreme Court, the motion for a rehearing was made within the time prescribed by our own rule. But it has been suggested that the rule refers to the supreme court of the District of Columbia. A majority of the judges, however, are of opinion that such is not the meaning of the rule. The nature of the jurisdiction of the general term shows that such cannot be the design of said

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rule. The right of appeal from the special to the general term of this court extends without limitation to every final decree or judgment in equity. The language of the statute is that "any party aggrieved by any order, judgment, or decree made or pronounced at any such special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of said supreme court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, review, or modify the same as shall be just." (12 Stats. at Large, p. 763, sec. 5.)

It is to be observed that appeals are mentioned in this section as lying to the general term, and this is appropriate phraseology, for it would seem incompatible with the unity of the court to talk of taking an appeal to itself. There are several cases in which the jurisdiction of this court is exclusive—suits for divorce, criminal prosecutions, and in civil suits where the amount does not exceed a certain sum—and of course in such cases no appeal lies to the Supreme Court of the United States. We think it was this class of cases that was intended to be regulated by the rule in question, and therefore conclude that the motion for a rehearing was made within the time limited for that purpose by the rule of court.

We confine our decision to this point. We declined to hear the case *de novo* upon the merits. The bill was dismissed without prejudice, at defendant's costs, and he takes the appeal. It is a matter of sound discretion with the justice who hears a cause in equity who shall pay the costs, and his action in dismissing a bill without prejudice ought not to be reviewed unless there is a plain and palpable error, which is not the case here.

Decree below affirmed.

Mr. Justice OLIN delivered the following dissenting opinion:

The last decree made in this cause, and which is appealed from, I think is erroneous, and I will state as briefly as I can the reasons which induce that belief.

1. The term at which the first decree was entered and

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signed by the presiding justice had closed, and the decree had become a matter of record and could not be set aside, altered, or modified at any subsequent term, except upon a bill of review.

2. The proceedings in this case subsequent to the entry of this first decree bear no resemblance to a bill of review. It was not so treated by either court or counsel, though in some of the papers it is spoken of as a bill of review. It was simply a motion made on *ex-parte* affidavit with notice to the opposite party, and defended by an *ex-parte* affidavit, and upon these *ex-parte* affidavits the former decree was set aside and the decree entered which is appealed from. If the proceeding is to be regarded as a motion for a rehearing of the case, the judge might grant or refuse that motion if his construction of the 87th Equity Rule be the proper one; but instead of that he decides the whole controversy upon the *ex-parte* affidavits, revokes his former decree, and enters a new and different decree; this was wholly irregular. If a rehearing was granted the parties should have been at liberty to take evidence on both sides in support of their allegations. The evidence having been closed, the cause set for hearing in the ordinary course of practice might be disposed of when reached on the calendar as are other cases; but nothing of the kind was done, and the proceeding was throughout treated as a motion based on *ex-parte* affidavits, and upon reading those, apparently, the order appealed from was made.

It is attempted to justify this order under and in pursuance of the 87th Rule in Equity, but I submit, with all deference to the learned judge who tried this cause, it has no application whatever to the case. It was not intended, to my certain knowledge, to have any such construction or meaning as put upon it by the justice who tried this cause. In his opinion, printed in this case, he has injected into the rule after the words Supreme Court "*United States.*" The rule says nothing of the kind, and was not intended to. Having chiefly been instrumental in preparing and drawing up the equity rules that were subsequently adopted by this court, I am well aware of what was intended by the 87th rule. The words, in the rule, "supreme court" were intended to refer to and mean the supreme court of the District of Columbia, and not the

Supreme Court of the United States, and any other construction of the rule seems to me worse than nonsense, since by the rules of law and by the organic act creating this court no appeal whatever lies to the Supreme Court of the United States from any order, judgment, or decree made at a special term by one of the justices of this court. The meaning of the rule is simple, clear, and obvious, and it is simply this, that the justice holding a special term may in his discretion entertain a motion for opening, modifying, or altering, or reviewing any decree passed at any former term, providing such decree or order was not appealable to the supreme court; that is, to this court in banc or in general term.

It will be remembered by most of my brethren upon the bench who took their seats upon the passage of the organic act creating this court, that much controversy and discussion arose whether the act created one or a half-dozen courts, or whether it created one court known as the supreme court. For this construction we all contended, and our construction of the law was finally settled by an act of Congress passed soon after the decision of the Supreme Court of the United States in the case of *ex-parte* Bradley. If the rule had simply said that where no appeal lies to the supreme court of the District of Columbia, or the supreme court of this District sitting in banc, the meaning of it would have been too plain and obvious to admit of dispute, and all that renders the rule at all obscure is thrusting into it after the words "supreme court" "United States" instead of District of Columbia. Lastly, if I am wrong in all this, the great question in the case remains whether the proceedings subsequent to the first decree be called a motion for a rehearing or a bill of review. Are there any facts stated in the papers which, according to the rules and practices of a court of equity, will permit a decree to be opened and the cause again to be proceeded in as though no decree had been made? For that is truly the effect of this order or last decree. It is true the justice simply modifies the first decree, but if he had a right to open it he might go on and grant a divorce just as well as make the second decree.

The rule is not to be tested by the extent of the change of the first decree, but by the principle upon which any change is made. Looking at the papers in the case, I am constrained

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to say there is, in my opinion, no ground whatever for the last *decree*. Dismissing a bill without *prejudice* is, in chancery, equivalent to granting a new trial in a court of law, and is governed in both cases by rules as clearly prescribed and as well defined as it is possible to do. It would indeed be a novel ground in an application for a new trial at law or a rehearing of a cause in a court of equity that the counsel or attorney did not give all the testimony on the first trial he might have given had he not supposed he had given enough. To grant a new trial on such grounds would be offering a premium to knaves or fools, which a court of equity seldom does.

The only other ground for a rehearing alleged is that a decree signed by the court was inadvertently signed. Judging from the opinion expressed, this last ground seems to have been the controlling one that resulted in the last decree. This last decree or order was actually signed by the justice. I think he, and all claiming under his decree or affected by it, are estopped from disputing its validity, unless some fraud or imposition was practiced upon him to obtain his signature to the decree, nothing of which is alleged or pretended.

To hold the contrary doctrine would require us in all cases to trust to the treacherous and uncertain memory of the judge rather than to the judicial records subscribed by his own hand.

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ACTION.

See CONTRACT, 1, 8.

CORPORATION, 1, 2, 3, 4.

HUSBAND AND WIFE, 1, 2.

PARTIES, 1, 2.

MUNICIPAL VOUCHERS, 1, 2.

1. By the rules of the common law, a married woman, to whom a draft, promissory note, or other promises are made, cannot maintain an action thereon in her own name during coverture. When the cause of action is in her own right, her husband was required to be joined with her in the suit. *Kimbro vs. National Bank*, 61.
2. The act of Congress regulating the rights of married women in this District has not changed the rules of the common law, so as to enable a married woman to maintain an action in her own name upon a chose in action which she had prior to the passage of the law. *Ib.*
3. Where it was agreed that the owner should have the reasonable use of the property, and pay the expenses of keeping the same, and he tendered the sum advanced within six months, but the pledgee had disposed of the property to a third party: *held*, that the owner may maintain trover for their conversion; *held, also*, that if the latter had been deprived of the reasonable use of the property, the expenses of keeping it could not be recovered from him. *Starkweather vs. Prince*, 144.
4. The testimony showed that the payee named in a promissory note died in 1863, and that his widow acted for some time afterward as sole executrix of his will, and in that character indorsed the note to the plaintiff. *Held* that, in order to enable plaintiff to maintain an action upon said note, it is necessary to produce and prove a will conferring authority upon such executrix to transfer such note absolutely as the property of the plaintiff. *Russell vs. Russell*, 263.
5. The defendant is a Virginia railroad-corporation, and had an agreement with a similar corporation in the District of Columbia, by which the defendant ran its trains over the track of the latter, into said District, and through the city of Washington, said trains being in the charge of the servants and agents of the defendants, except the conductor, who was in the employment of the company whose track the defendant so used. *Held*, that the defendant is liable for a personal injury produced by carelessness on the part of defendant's agents in running a train of cars through the city of Washington on the track of the other company. *Mills vs. Railroad Company*, 285.

6. The right of action for a tort to the person dies with the person injured. *Chichester vs. Union Transfer Company*, 295.
7. C. executed a deed of trust on real estate to secure a note for \$1,000. He afterward conveyed the premises in fee to G., whom he alleges verbally agreed to assume the incumbrance. The plaintiff subsequently purchased the premises at auction, without being informed of said agreement, and conveyed to B. with covenants of warranty; and, in order to protect the title of his vendee, purchased the note in question, and brought this action thereon against C. *Held*, that the equities between C. and G. furnished no defense against the present plaintiff. *Eastwood vs. Carrington*, 299.
8. The act of Congress to provide a government for the District of Columbia creates the board of public works, and provides that they "shall have entire control of the streets, and shall make all regulations for keeping them in repair," and the members of the board are to be appointed and paid by the United States. *It is, therefore, held*, that they act independently of the municipal government of the District, and that the District is not liable in an action at law for damage occasioned by the negligence or misconduct of the said board. *Barnes vs. District of Columbia*, 322.
9. The plaintiff, who is a newspaper-carrier, alleges that a former proprietor of the Daily Morning Chronicle agreed to give him the exclusive right to sell and deliver that paper on a certain route in Washington; that such owner sold out to another person, and that defendant has succeeded to the ownership of the paper, and that he renewed the contract with both. He alleges performance, but claims that defendant broke the contract by refusing to deliver to him any more papers. *Held*, that the plaintiff could not maintain an action on said contract, for the reason that it is void for uncertainty and want of mutuality; also for the reason that it is not alleged to be in writing or to be performed within a year, and is therefore void within the 4th section of the statute of frauds. *Fallon vs. Chronicle Publishing Company*, 425.
10. Where a through-line for transportation of passengers and freight is established by the owners of different railroads, the first carrier who receives fare for the whole route, and gives a through-check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line throughout the entire distance. *Croft vs. Baltimore and Ohio Railroad Company*, 492.
11. Where three companies constitute a through-line, and the fare received for through-tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership, involving joint liability. *Ib.*
12. No other company can be sued for a loss unless such occurred on its own line. *Ib.*

13. Where the defendant is the payee and first indorser on a series of promissory notes, and the plaintiff's name is used as second indorser, and both became parties to the paper for the accommodation of the maker, if, upon notice of non-payment, the plaintiff takes up said notes, he may maintain an action against the said first indorser for the amount advanced on account of such payment. *Pomeroy vs. Clark et al.*, 606.

ADVERSE POSSESSION.

1. Where a widow remains in occupation of the family residence for a period of forty years after the death of her husband, under a claim of ownership, an adverse possession arises which will bar an action of ejectment by the heirs of the husband. *Hogan vs. Kurtz*, 135.
2. The knowledge of the heirs of the exclusive character in which she holds may be presumed from such continuous possession when combined with other circumstances. *Ib.*
3. An ejectment, instituted thirty years before the present action by the ancestor and grantors of the present plaintiffs, which was resisted and defeated by the widow, is a sufficient proof that the heirs of the husband knew she was not holding the premises in subordination to their rights. *Ib.*

AGENT.

See TRUSTEE, 1.

APPEAL.

See INJUNCTION, 6.

1. An appeal does not lie to the general term from an order made at the circuit, setting aside a verdict for plaintiffs and granting a new trial. *Philp & Solomons vs. Gardner & Angus*, 165.
2. A preliminary injunction not a final order or decree, and not appealable. *Barber vs. Strong*, 574.

ARBITRATION.

See INSURANCE OF LIFE, 4, 5, 6.

AMENDMENT.

1. An information in a criminal case charged the defendant with keeping a tippling-house "at house No. 1601 Q street," in the city of Washington, and, on the trial of the cause before a jury, it was proven by the witnesses for the prosecution that defendant committed the offense at No. 1601 Twelfth street. The attorney for the District then asked permission of the court to amend the information by striking out the house, number, and street laid in such information, which was allowed, the defendant excepting. Held, that such amendment could not be made at the trial of the cause. *District of Columbia vs. Herlihy*, 466.

2. Where a criminal information is required by statute to be under oath, it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant. *Ib.*
3. The act of assembly providing that technical or clerical errors may be amended at the trial, extends only to formal or ministerial mistakes. *Ib.*

ASSIGNMENT.

See ATTORNEY AT LAW, 3.

ATTORNEY AT LAW.

1. An attorney or counselor at law who successfully prosecutes a private claim against the United States, for a contingent fee of the amount allowed, has a lien upon the fund which may be enforced against the claimant, even when the money is in the Treasury of the United States. *Child vs. Trist*, 1.
2. A contract to prosecute such claim before Congress is not void as against public policy, when the services are to be rendered in an open and fair presentation of facts, and where no secret or corrupt means are employed to mislead or deceive the members of the legislative body. *Ib.*
3. Nor does such an agreement operate as a transfer or assignment of a part, or interest in the claim, so as to make it void by the provisions of the act of Congress of February 26, 1853. It is a method of fixing the compensation in procuring the allowance of the claim. *Ib.*
4. R. and S. were attorneys at law, and agreed to conduct a suit in chancery for the recovery of lands claimed by H. and wife, who agreed to give said attorneys one-third of whatever land or money might be recovered. A decree was obtained in favor of H. and wife for the lands, and also for the rents and profits. The attorneys received one-third of such rents in money, and bring this bill to enforce the execution of the agreement for an undivided third of the land so recovered. *Held*, that the common-law principle of champerty, as relaxed by modern decisions, is in force in the District of Columbia. That the agreement between R. and S. and the defendants, H. and wife, being for a part of the land in dispute, was a champertous contract, and therefore void. That contracts between attorneys and clients are carefully watched by the courts, and will be considered generally as a security for what the services are really worth. That agreements between attorney and client, fairly made, for contingent fees, will be sustained both in law and equity. *Stanton vs. Haskin et al.*, 558.
5. Upon a bill of interpleader where the fund in dispute has been assigned, and had been collected by the complainants upon a draft in favor of the assignee, and on his account, it was held that he was entitled to the money against his co-defendant, who claimed it upon the ground that he had an attorney's lien upon the fund. *Adams Express Company vs. Adams et al.*, 642.

ATTORNEY IN FACT.

1. The acknowledgment of a power of attorney before the clerk of a county court, with the seal of the court affixed, does not raise a presumption of law that the instrument was executed by the person mentioned in the certificate of said clerk. Where there is evidence tending to prove and disprove a valid execution, the question must be submitted to the jury upon all the facts. *Kimbrow vs. First National Bank*, 415.
2. If there is a valid execution of a power of attorney, it is a sufficient authority to the attorney to place the name of the payee on the back of a draft, and to receive the money thereon. Or if the power of attorney was left in the hands of the attorney, to be used by him, and he filled the blanks therein, and by that means placed the indorsement on the draft, it would be a good and valid utterance of the draft as against the payee, or those claiming under her. *Ib.*

BILL OF EXCHANGE.

See PROMISSORY NOTES.

TREASURY DRAFT, 1, 2, 3, 4, 5.

1. L. accepted a bill of exchange for the accommodation of T. H. & C., with the understanding that they would raise money on it with which to pay their indebtedness to plaintiff. They also agreed to take care of the acceptance, and plaintiffs were so informed, but, failing to raise money on it, transferred it to plaintiff in payment of such indebtedness, and also in consideration of further advances and forbearance. *Held*, that this was not a misappropriation of the acceptance; that such transfer was for value, and in the usual course of business, and that plaintiffs were entitled to recover against such accommodation acceptor. *Leach et al. vs. Lewis*, 112.
2. W. made his bank-check for the accommodation of B., who transferred it to D. The latter did not present it for payment at the bank for upward of five months. For three or four months after the date of the check, B. was in solvent circumstances and the money could have been collected out of him, but subsequently he became insolvent, and so continued to the time of the trial. Immediately before the check was presented, W. directed the bank not to pay it. *Held*, that the drawer of a check appropriates the amount it calls for out of the deposit to his credit in the bank at the time of its date, and he has no right to withdraw it afterward; and also, if the holder of a check delays in presenting it, and in the mean time the bank fail, the loss will be his and not that of the drawer; and also, that the check was an accommodation-check loaned by W. to B., cannot exonerate him from liability, for he occupies the ground of the maker of commercial paper. *D'ener vs. Brown*, 350.

3. A bill of exchange on three months, drawn in New York, upon S. in the city of Washington, and by him accepted for the accommodation of the drawer, and returned to such drawer in New York, where he negotiated it, upon an agreement that the person making the discount should retain a sum greatly beyond the rate of interest allowed by the laws of that State. *It was held*, that the validity of the contract was to be determined by reference to the statute of New York, which declared a contract void when usurious, and that consequently the bill now in suit was void for that reason. *Galludet vs. Sykes*, 489.
4. An acceptance is to be deemed a contract of the place where it is made; but where it is solely for the accommodation of the drawer, it is not a contract capable of being enforced until the paper is transferred to a holder for a valuable consideration, and the place of such transfer is to be regarded as the place of the contract, especially when no other place of performance is mentioned. *Ib.*

BILL OF INTERPLEADER.

1. Upon a bill of interpleader where the fund in dispute has been assigned and had been collected by the complainants upon a draft in favor of the assignee and on his account, *it was held*, that he was entitled to the money against his co-defendant, who claimed it upon the ground that he had an attorney's lien upon the fund. *Adams Express Company vs. Adams et al.*, 642.

BOARD OF PUBLIC WORKS.

See DISTRICT OF COLUMBIA, 3, 4.

BOARD OF HEALTH.

See NUISANCE, 1, 2.

DISTRICT OF COLUMBIA, 5, 6.

BUILDING ASSOCIATION.

1. The advance of money made by a building association to one of the stockholders, upon the shares which he owns, is not a loan of money, but a purchase of such stock, and is therefore not affected by usury, and an account rendered by the association in which such advance is charged as a loan is erroneous. *Pabst vs. Building Association*, 385.
2. Where the constitution of the association provides that no stockholder shall be permitted to withdraw who has received any portion of his stock in advance until the same has been fully repaid, he is entitled to withdraw on paying up any balance due by him on a settlement of the account, and it is repugnant to equity, in making such settlement, to aid in enforcing fines and penalties of an oppressive character, such as are found in the constitution of this association, and these may be properly excluded from the account. *Ib.*

CERTIORARI.

1. The writ of certiorari lies from the supreme court of the District of Columbia to justices of the peace in civil actions, before judgment, in all cases where the amount in controversy exceeds the sum of fifty dollars. *Coleman vs. Freedman*, 160.
2. This court has jurisdiction concurrently with justices of the peace when the claim or demand exceeds the sum of fifty dollars, and as there is no provision for the removal of such cases from said justices by appeal into this court after a jury-trial, the proper course is to bring them here by certiorari, to be tried in the first instance. *Ib.*
3. Writ of certiorari is the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded or is proceeding to judgment without jurisdiction. In a case where the police court has no jurisdiction, the writ may issue to review such proceedings, although the statute provides for an appeal where there is to be a retrial of the case. *Bates vs. District of Columbia*, 433.

CHAMPERTY.

R. and S. were attorneys at law, and agreed to conduct a suit in chancery for the recovery of lands claimed by H. and wife, who agreed to give said attorneys one-third of whatever land or money might be recovered. A decree was obtained in favor of H. and wife for the lands, and also for the rents and profits. The attorneys received one-third of such rents in money, and bring this bill to enforce the execution of the agreement for an undivided third of the land so recovered. *Held*, that the common-law principle of champerty, as relaxed by modern decisions, is in force in the District of Columbia. That the agreement between R. and S. and the defendants, H. and wife, being for a part of the land in dispute, was a champertous contract, and therefore void. That contracts between attorneys and clients are carefully watched by the courts, and will be considered generally as a security for what the services are really worth; and that agreements between attorney and client, fairly made, for contingent fees, will be sustained both in law and equity. *Stanton vs. Haskin et al.*, 558.

CHARITABLE TRUSTS.

See TRUSTS, 9, 10, 11, 12.

1. A will devised fourteen lots of ground in the city of Washington, in trust, "for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by act of Congress, for such hospital, and upon such incorporation; upon further trust to grant and convey said trust-estate to the institution so incorporated, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivors of them, or their successors in the trust; and if not so approved, then upon further trust to hold the said lots for the

same purpose until a corporation shall be so created by act of Congress and shall meet the approval of said trustees, &c., to whom full discretion is given in this behalf; and upon such approval, in trust, to convey as aforesaid," &c. *Held*, that the devise was not void under the rule in regard to perpetuities, which has no application in case of a trust for charitable purposes, nor is the devise void on account of the uncertainty of its objects. *Ould vs. Washington Hospital for Foundlings*, 541.

2. The jurisdiction of the court over charitable trusts rests on ancient and well-settled grounds, independently of the statute of 13 Elizabeth. *Ib.*
3. As the trustees are invested with absolute discretion, if even Congress should fail to create a corporation, or one acceptable to the trustees, or if the grant to the future corporation should be void, the trustees would hold the property themselves for the same purpose, and might erect the hospital. *Ib.*
4. As the taxes, charges, and assessments are directed to be paid by the executors out of the residue of the estate, it was contemplated that the corporation should be created during their life-time, and before the final settlement of the estate. The conveyance was, therefore, to be made within the period prescribed by the rule of perpetuities. *Ib.*

CHECKS.

W. made his bank-check for the accommodation of B., who transferred it to D. The latter did not present it for payment at the bank for upward of five months. For three or four months after the date of the check, B. was in solvent circumstances and the money could have been collected out of him, but subsequently he became insolvent, and so continued to the time of the trial. Immediately before the check was presented W. directed the bank not to pay it. *Held*, that the drawer of a check appropriates the amount it calls for out of the deposit to his credit in the bank at the time of its date, and he has no right to withdraw it afterward; *also*, if the holder of a check delays in presenting it, and in the mean time the bank fail, the loss will be his and not that of the drawer; *also*, that the check was an accommodation-check, loaned by W. to B., cannot exonerate him from liability, for he occupies the ground of the maker of commercial paper. *Deener vs. Brown*, 350.

COMMON CARRIER.

1. The delivery of inanimate property on the platform of a railroad company, which is the usual place of receiving freight preparatory to shipment, and under an agreement previously made for the transportation of the same, is a sufficient delivery to charge the railroad company with liability as a common carrier. *Bowie vs. Baltimore and Ohio Railroad Company*, 94.
2. But where the property consists of race-horses, accompanied by the

agent of the owner, assisted by other persons in the employment of the owner, three of whom are race-riders for the horses, and who travel with and take care of them, and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading it as he thought best, after having been requested by the railroad employés to place the horse under their control, the owner would not be entitled to recover for an injury to the horse sustained under such circumstances. *Ib.*

3. On the trial of an action for such injury, where there is a conflict of testimony as to whether the agents of the road or those of the owner had charge of the horse when the accident occurred, it is erroneous to charge the jury that if the servants or agents of the owner refused obedience to the agents of the road, the latter would still be responsible for the injury, and that it is their duty, if they could not control the servants of the owner, to refuse transportation of the horses, in order to escape such responsibility. *Ib.*
4. In an action against a railroad company as a common carrier, for an injury to living freight, a witness was not allowed to answer a question whether the freight had been in fact delivered to the defendant where the delivery was disputed, and other witnesses had stated the facts and circumstances relating to the delivery. *Bowie vs. Baltimore and Ohio Railroad Company*, 609.
5. Whether freight has been delivered to a common carrier so as to fix his responsibility is a mixed question of law and fact, and is usually shown by proving that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied with notice to him that it is there for transportation. *Ib.*
6. Where a contract was entered into by which four horses were to be transported from Washington to Baltimore on the railroad of defendant, and the horses were to be accompanied by their grooms, and if the horses, in accordance with the agreement, were admitted to the inclosure where the defendant usually received such freight, and the defendant notified that they were there; and if the process of loading them had been partially completed by the shipment of three of the horses with their grooms: *held*, that, although the agents of both parties were engaged in such loading when the injury occurred, these facts would constitute a delivery of the animals. *Ib.*
7. Such an agreement is no waiver of the strict responsibility of the defendant as a common carrier, any further than it might be modified by the fact that persons were to be sent by the owner along with the property; and if the property is injured through the negligence of the agents of the defendant, it is liable for the damage; and if the injury was caused by the act or conduct of the owner's servants, the defendant would not be responsible.

CONGRESS.

See ATTORNEY AT LAW, 1, 2.
 HUSBAND AND WIFE, 1, 2, 3.
 ACTION, 1, 2.
 MARRIED WOMEN, 1, 2, 3.
 SERVICE OF PROCESS, 1.
 WITNESSES, 3.

CONFISCATION ACTS.

A person who engaged in the rebellion and whose real estate has been sold under the acts of Congress of August 6, 1861, and July 17, 1862, in pursuance of a judicial decree of confiscation, forfeits thereby its use during life; but such decree and sale does not work a divestiture of title, and he has afterward the right to execute a mortgage or conveyance of the same property; which, however, will only take effect on the termination of the life of the original owner. *Wallach vs. Van Riewick*, 73.

CONSTITUTIONAL LAW.

1. Male citizens only can exercise the elective franchise in the District of Columbia. *Spencer vs. Board of Registration*, 169.
2. The elective franchise is not a natural right, and is made to rest, in the United States, upon the authority of law which defines the qualifications of those citizens who may exercise it. *Ib.*
3. By the first clause of the fourteenth amendment the plaintiff and all other persons born in the United States are citizens thereof, and are therefore capable of becoming voters. But the amendment does not execute itself, and it requires legislative action to authorize them to vote. Congress has carried this right into effect in this District by extending its exercise only to male citizens. *Ib.*
4. The act of the legislative assembly of the District of Columbia, passed June 23, A. D. 1873, and entitled "An act to regulate shows and exhibitions in the sale and disposal of seats," is a vexatious and unlawful interference with the rights of private property, and as such the legislative assembly was incompetent to enact it. *District of Columbia vs. Saville et al.*, 581.

CONSULAR COURTS.

1. The treaties between the United States and Turkey, together with the act of Congress of July 22, 1860, authorize our ministers and consuls in Egypt to exercise judicial powers over American citizens in that country, in civil as well as criminal matters. *Dainese vs. Hale*, 86.

CONTEMPT.

The House of Representatives has power to commit for contempt, and when a party is found guilty of a contempt the order of the House directing his commitment is a complete protection to the Speaker who orders him into custody of the Sergeant-at-Arms. *Stewart vs. Blaine*, 453.

CONTINGENT FEE.

See ATTORNEY AT LAW, 1, 2.

CONTRACT.

See INSURANCE OF LIFE, 1, 2, 3.

ACTION, 9.

1. F. entered into a written agreement, together with others, who were part-owners with him, for the sale of their joint property to C.; and it was one of the conditions of the transfer that F. should be employed by C. for one year, at a salary of \$2,500 per annum, payable monthly. *Held*, that F. should maintain an action against C. for a month's wages, as they fell due, if C. refused to pay the same; *held, also*, that it was an independent covenant with F., and that he could sue for such wages in his own right, without making the other part-owners of the property conveyed parties to the suit. *Fowler vs. Ice Company*, 14.
2. Where, however, the undisputed facts show that F. absented himself from the duties of such employment for a period of twelve days, on account of the sickness of a child, but without giving notice or obtaining leave from C., there is a breach of contract on his part, and if C. refuses to receive him back again into service he cannot maintain an action for salary after such breach; *held, also*, that it is error, where the fact of absence is undisputed or admitted, to submit the question to the jury whether such facts were or were not a breach of the contract. *Ib.*
3. L. made an agreement with P., by which the former was to take charge as foreman of glass-works belonging to P., and the latter was to pay him fifteen dollars per week, and at the end of eight months to transfer to L. an interest of \$600 in the works, or, if he should prefer, in money. After L. commenced work the factory was burned, and he took charge of rebuilding it, and continued for nearly a year to manufacture glass after the factory was rebuilt. The written contract was made after such rebuilding, and when the eight months expired L. elected to take the money. *Held*, that there was a substantial performance of the contract, and that L. was entitled to recover the \$600 in money. *Langdon vs. Purdy*, 23.
4. It is sufficient to set aside a deed or contract on account of drunkenness if the party executing it be incapable of understanding its terms and conditions. It is not necessary to prove an entire loss of reason, or that the party was entirely demented by drink, in order to avoid it, but the act will be rendered void if the party was in such a condition of mind that he could not comprehend what were the terms and conditions of the instrument. *Harmon vs. Johnston et al.*, 139.
5. A party who seeks to avail himself of a collateral compromise agreement, by the terms of which the original contract is to be delivered up upon certain specified payments being made, must show that he has fulfilled the compromise in this respect, in order to defeat a remedy on such original contract. *Spofford et al. vs. Brown et al.*, 223.

6. The plaintiff entered into a contract by which he agreed to employ the defendants in the prosecution of a number of claims against the United States which he held as agent for other persons, and he was to have one-third and the defendants two-thirds of the fees. It was then stipulated, "that in the cases of T. J. Cohan, Nicholas Culliton, and P. Moran the fees shall be equally divided between the parties hereto." *Held*, that, as to the cases here specifically mentioned, the agreement was independent and not affected by the stipulation in relation to other cases. *Hoss vs. Wilson*, 474.
7. It is no defense to a bill charging defendants with having collected the claims specified in the agreement and praying for a discovery and an account, to set up that plaintiff had made false representations at the time of entering into the contract as to the amount and character of the other claims which he would probably procure, and that he had failed to obtain other cases for the defendants to prosecute. *Ib.*
8. The plaintiff, who is a newspaper-carrier, alleges that a former proprietor of the Daily Morning Chronicle agreed to give him the exclusive right to sell and deliver that paper on a certain route in Washington; that such owner sold out to another person, and that defendant has succeeded to the ownership of the paper, and that he renewed the contract with both. He alleges performance, but claims that defendant broke the contract by refusing to deliver to him any more papers. *Held*, that the plaintiff could not maintain an action on said contract, for the reason that it is void for uncertainty and want of mutuality; *also*, for the reason that it is not alleged to be in writing, or to be performed within a year, and is therefore void within the 4th section of the statute of frauds. *Fallon vs. Chronicle Publishing Company*, 485.

CORPORATION.

1. A railroad corporation, created by the legislature of Virginia, and also allowed to run its road, by act of Congress, into the District of Columbia, borrowed a sum of money in the city of New York, through the agency of its treasurer, and no part of it having been repaid, suit was commenced in the supreme court of the State of New York, by service of process upon its secretary, who was found there, and judgment rendered for the full amount. Action is brought in this court upon a transcript of the judgment. *Held*, that the corporation having contracted the debt in the State of New York, the court there obtained complete jurisdiction by such service, and that such judgment is entitled to the same conclusiveness here as in the State where it was rendered; *held, also*, that it is competent for a State legislature to authorize the commencement of suits by the service of process upon the president, secretary, or treasurer of a foreign corporation having a place of business, or making contracts within that State. *Weymouth vs. Railroad Company*, 19.
2. A corporation can have no legal existence out of the boundaries of the sovereignty by which it was created, and can only be sued in a dif-

ferent State by express legislation authorizing such suits against foreign corporations having agents within the State, conducting the business for which it was organized. *Lathrop vs. Union Pacific Railroad Company*, 234.

3. For the purpose of litigation, a corporation is to be considered an inhabitant of the State under whose laws it exists. *Ib.*
4. The act of Congress incorporating the Union Pacific Railroad Company extended the privilege of certain land-grants and other subsidies to the Union Pacific Railroad Company, Eastern Division, upon the same conditions as are imposed on said first-named company, and said act also provided that said first-named company can sue and be sued in all courts of law and equity within the United States. *Held*, that, although the Union Pacific Railroad Company, Eastern Division, accepted the aid of the statute, its capacity for suing and being sued was not thereby enlarged, and being a corporation of the State of Kansas could not be sued in this jurisdiction. *Ib.*

COVENANTS.

See LEASE, 1, 3.

CONTRACT, 1.

CRIMINAL LAW.

1. The act of Congress of January 17, 1870, confers original jurisdiction of the offense of petit larceny on the police court of the District of Columbia. *United States vs. Charles Cross*, 144.
2. When the last act is read with the 4th section of the act of February 22, 1867, it is little short of an express declaration of an intention to make petit larceny a simple misdemeanor. *Ib.*
3. Congress has power to reduce a pre-existing felony to the proportion of a misdemeanor, where the penalty is not fixed by the Constitution, and though Congress cannot dispense with indictment in the process of punishment if the offense is infamous, it is equally clear that it has the power to reduce a crime from the grade of infamous to misdemeanor when the Constitution is silent as to the punishment and the infamy. *Ib.*
4. To make a penalty infamous, it must pronounce against the offender a degradation from his civil rights, and in the absence of such forfeiture the crime is not legally infamous unless it is so expressly pronounced. *Ib.*
5. The offense of petit larceny, at the date of the passage of the acts referred to, was not an infamous offense in contemplation of the Constitution, and might therefore be punished without indictment, and was within the jurisdiction of the police court. *Ib.*
6. The jurisdiction of the circuit and criminal courts previously existing in the District of Columbia was transferred to this court by the organic act of March 2, 1863; and the relief now granted to a party convicted of crime in the criminal court is an appeal to the general term instead of the writ of error which was the mode of practice under the former jurisdiction. *United States vs. Wood*, 241.

7. The decision of the justice holding the criminal court, overruling a motion for a new trial, is not a proper subject of review on an appeal to the general term. *Ib.*
8. A motion for a new trial is an application to the sound legal discretion of the court in which the trial took place, and is not the subject of error or appeal. *Ib.*
9. Whether in case of abuse of judicial discretion so palpable in its character as to involve corruption or imbecility, the matter would be without remedy *quaere.* *Ib.*
10. Alleged misconduct of a juror considered. *Ib.*
11. An information in a criminal case charged the defendant with keeping a tippling-house "at house No. 1601 Q street," in the city of Washington, and, on the trial of the cause before a jury, it was proven by the witnesses for the prosecution that defendant committed the offense at No. 1601 Twelfth street. The attorney for the District then asked permission of the court to amend the information by striking out the house, number, and street laid in such information, which was allowed, the defendant excepting. *Held*, that such amendment could not be made at the trial of the cause. *District of Columbia vs. Herlihy*, 466.
12. Where a criminal information is required by statute to be under oath, it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant. *Ib.*
13. The act of assembly providing that technical or clerical errors may be amended at the trial, extends only to formal or ministerial mistakes. *Ib.*

DEED.

1. A deed of lands in the State of Maryland acknowledged in the District of Columbia, before a justice of the peace of said State of Maryland, but who is not authorized by law to take acknowledgments of deeds in the said District of Columbia, is defective and void. *Cowan vs. Beall*, 270.
2. If such deed has been recorded and all the purchase-money paid, the court will direct the vendor to execute a valid deed of the premises; and, in default of compliance with such decree, that the decree stand for a conveyance of the property. *Ib.*
3. A tax-deed is void where the advertisement of notice of sale contains no dollar-mark at the head of the column of figures. *Coombs vs. O'Neal*, 405.
4. Testimony of witnesses tending to show an alteration in the name of the grantee in a conveyance of real property will not affect the validity of the deed when no such alteration appears upon its face, and when it is evident that the witnesses are laboring under an obvious and palpable mistake. *Tucker et al. vs. Ormes et al.*, 652.

DEED OF TRUST.

1. A deed of trust to secure a present indebtedness, and also to secure future advances within a given time, and to a specified amount, is a good and valid security unless some right intervenes before the advances are made. *National Bank vs. Morsell*, 155.

2. It is sufficient compliance with the revenue laws, if the deed is stamped for the amount of the then debt, and it is also sufficient if each bond taken on a new advance to be secured by the deed is stamped for the amount it represents. *Ib.*
3. A deed of trust directed the trustee to permit the *cestui que trust* to enjoy the rents, issues, and profits arising from the trust-estate during his life, and to hold the same until his children should come of age. The deed afterward contained a provision in these words: "And in the mean time apply the rents, issues, and profits arising therefrom to the support, maintenance, and education of the said child or children." *Held*, that such *cestui que trust* had not an interest in the property, which equity would apply to the satisfaction of a judgment-debt. *Starr vs. Keefer*, 166.

DEPOSITION.

See PRACTICE, 12, 13, 14.

DEVISE.

1. A devise was made to an executor, his heirs, &c., in trust, to manage and dispose of the property in his discretion for the husbanding and increase thereof during the minority of the two grandsons of the testator; one-half to be turned over to the elder coming of age, and the other half to the younger coming of age; and if either died, his share to go to the survivor. The elder attained the age of twenty-one, and died without having been married; and the survivor attained the age of twenty-one, married, and died intestate, leaving a widow. The survivor occupied the property and exercised ownership over the same until his death. No deed of conveyance was ever made by the executor to such survivor, and the said executor is now dead. *Held*, that the executor took the legal estate for a particular purpose only until the devisees should severally arrive at the proper age; that, the survivor having taken possession, he became seized in deed and in fact, and thereby became invested with the full legal title, and that no conveyance from the executor was necessary, as the will itself did not prescribe that formality; *held, also*, that upon the death of the survivor his widow became entitled to an estate of dower in the premises. *Haw vs. Brown et al.*, 189.
2. A will devised fourteen lots of ground in the city of Washington in trust "for a site for the erection of a Hospital for Foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by act of Congress, for such hospital, and upon such incorporation upon further trust to grant and convey said trust-estate to the institution so incorporated, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivors of them, or their successors in the trust; and if not so approved, then upon further trust to hold the said lots for the same purpose until a corporation shall be so created by act of Con-

gress, and shall meet the approval of said trustees, &c., to whom full discretion is given in this behalf; and upon such approval in trust, to convey as aforesaid," &c. *Held*, that the devise was not void under the rule in regard to perpetuities, which has no application in case of a trust for charitable purposes, nor is the devise void on account of the uncertainty of its objects. *Ould vs. Washington Hospital for Foundlings*, 541.

3. The jurisdiction of the court over charitable trusts rests on ancient and well-settled grounds, independently of the statutes of 13 Elizabeth. *Ib.*
4. As the trustees are invested with absolute discretion, if even Congress should fail to create a corporation, or one acceptable to the trustees, or if the grant to the future corporation should be void, the trustees would hold the property themselves for the same purpose, and might erect the hospital. *Ib.*
5. As the taxes, charges, and assessments are directed to be paid by the executors out of the residue of the estate, it was contemplated that the corporation should be created during their life-time, and before the final settlement of the estate. The conveyance was therefore to be made within the period prescribed by the rule of perpetuities. *Ib.*

DISTRICT OF COLUMBIA.

1. The act of Congress to provide a government for the District of Columbia confers such powers only as are granted in the statute creating that government, and such powers as are necessary to carry into practical effect those which are expressly granted. *Barnes vs. District of Columbia*, 322.
2. This act confers upon the government it creates no control over the avenues, streets, or alleys in the District; nor does it impose on it any duty to repair or keep them in order, and therefore an action for an injury caused by a defect in one of the streets will not lie against the District. *Ib.*
3. The act creates the board of public works, and provides that they "shall have entire control of the streets, and shall make all regulations for keeping them in repair," and the members of the board are to be appointed and paid by the United States. *It is, therefore, held*, that they act independently of the municipal government of the District, and that the District is not liable in an action at law for damage occasioned by the negligence or misconduct of the said board. *Ib.*
4. On February 5, 1867, Congress authorized the Baltimore and Potomac Railroad to construct a lateral branch of their road into the District of Columbia, and prescribed how the road might pass along the public streets and alleys to the point of terminus within the city of Washington, and in no way subjected the railroad corporation to the control or supervision of the municipal government of the said city; *and it is, therefore, held*, that said corporation was exempted from all interference from such city government, and that it was erroneous to admit in evidence on the trial an ordinance of the common council in reference to the use of a street by said company. *Ib.*

5. The 28th section of the act of Congress to provide for a government for the District of Columbia designates a board of health, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; but it does not confer power upon said board of health to declare anything or any condition of things a nuisance, injurious to health, which was not a nuisance by the rules of the common law, or made such by some statute governing the District. *Bates vs. District of Columbia*, 433.
6. Where the defendant and his ancestors had prosecuted continuously the business of manufacturing soap and candles in the same place for a period of more than forty years, *it was held*, it could not be removed unless the facts upon which the question of nuisance depended were tried by due process of law, consisting of indictment and trial by jury; *and it was also held*, that the board of health had no authority to pass ordinances under which the defendant was prosecuted by information in the police court for the purpose of recovering a fine or penalty for maintaining the alleged nuisance. *Ib.*

DIVORCE.

1. Where real estate has been purchased by the joint earnings of husband and wife, and the title taken in the name of the wife alone, an equity by way of trust may be deduced for the benefit of the husband. *Jackson vs. Jackson*, 34.
2. In a petition for divorce by the wife in which no alimony is asked, and a cross-bill by the husband charging adultery upon the wife, and that the property was acquired since the marriage by their joint earnings, the divorce was granted upon her petition. *Still it was held*, that, under the 9th section of statute regulating divorces, the court has power to set off to the wife such part of the property as may be reasonable, in view of the resources and circumstances of the husband. *Ib.*
3. A final decree in a divorce suit in reference to alimony is not subject to alteration or revision on *ex-parte* affidavits, unless it is provided in such decree that either party be at liberty to apply thereafter to the court for a modification of such decree in respect to alimony. *Fries vs. Fries*, 291.
4. A husband cannot maintain a suit for divorce solely on the ground that his wife has denied matrimonial intercourse to him. *Steele vs. Steele*, 505.
5. A divorce will not be granted on the ground of the alleged insanity of the wife previous to marriage where more than thirty years have elapsed since the marriage, and a family of children are still living who have reached the age of maturity. *Secor vs. Secor*, 630.
6. The use of violent language and irritability of temper are not causes of divorce. *Ib.*
7. Where husband and wife agree to live separate and apart from each other, there can be no divorce on the ground of abandonment. *Ib.*

8. In a suit for a divorce the court can grant a rehearing for the purpose of conforming the decree to the decision at any time before the end of the next term, under the 87th rule in equity of this court. *Mercer vs. Mercer*, 655.

DOGS.

1. The law recognizes property in dogs. A city ordinance requiring the owner of such property to obtain a license for keeping the same is illegal. *Mayor, &c., vs. Meigs*, 53.
2. Dogs may be taxed like other property, but the owner cannot be arrested, fined, and imprisoned for the non-payment of such tax. *Ib.*
3. As a police regulation the owner may be required to muzzle his dog for the public safety. *Ib.*
4. Property in the dog grows out of his ascertained usefulness to man. *Ib.*

DOWER.

See DEVISE, 1.

1. The dower-right of a widow, which has not been assigned to her, may be subjected, in equity, to the payment of her own debts contracted since the death of her husband. *Davison vs. Whittlesey*, 163.
2. When it is manifest that an assignment of dower by metes and bounds is not practicable, a receiver will be appointed to take charge of and rent out the property until the widow's share of the rents and profits shall be sufficient to satisfy the judgment and costs. *Ib.*

DRUNKENNESS.

See CONTRACT, 5.

EASEMENT.

Where a deed of conveyance contained a clause giving the privilege of a road through the land of the grantor, but the same had not been executed by laying out the road for a period of more than sixty years, it will become inoperative as against a purchaser of the land, subject to such road, who had no notice of such claim, and where there was no road actually in existence at the time of his purchase. *Rires vs. Hickey*, 83.

EJECTMENT.

See ADVERSE POSSESSION, 1, 2, 3.

1. Where a defendant in ejectment sets up an outstanding mortgage belonging to a stranger to the record, in which he does not claim to be interested, it must be a present and subsisting mortgage; otherwise it will be presumed to have become extinguished. *King vs. Parkhill*, 23.
2. Where a mortgage was executed and recorded more than forty years before the commencement of an action of ejectment, it is presumed to be satisfied, and the court can so rule without the aid of a jury. *Ib.*

3. An assignment under the insolvent law in force in this District in 1814 vested the property of the insolvent immediately in the trustee, and the court will not presume, after the lapse of half a century, that his debts were paid without a resort to the property assigned, or that a reconveyance of the property was ever made to the insolvent or to his heirs at law. *Varden et al. vs. Todd*, 602.
4. Such an assignment is an outstanding title, and a good bar to an action of ejectment brought by the heirs at law of the insolvent. *Ib.*

ELECTIVE FRANCHISE.

1. Male citizens only can exercise the elective franchise in the District of Columbia. *Spencer vs. Board of Registration*, 169.
2. The elective franchise is not a natural right, and is made to rest, in the United States, upon the authority of law which defines the qualifications of those citizens who may exercise it. *Ib.*
3. By the first clause of the fourteenth amendment the plaintiff and all other persons born in the United States are citizens thereof, and are therefore capable of becoming voters. But the amendment does not execute itself, and it requires legislative action to authorize them to vote. Congress has carried this right into effect in this District by extending its exercise only to male citizens. *Ib.*

EQUITY.

See TRUSTEE, 1.

TAX, 1, 2, 3, 5, 6.

DEED, 1, 2.

TRUSTS, 9, 10, 11, 12.

DEVISE, 3.

SPECIFIC PERFORMANCE, 1. 2.

CHAMPERTY, 1.

ATTORNEY AT LAW, 4.

1. A deed of trust containing a mistake in having the word *west* instead of *east*, contrary to the intention of both parties, in the beginning of the description of the premises conveyed, will be corrected on a bill in equity filed for that purpose by the grantees, not only as against the grantors, but against the parties to a prior deed of trust upon the same premises of which said grantees had no knowledge or notice, and which was not recorded for over a year subsequent to the record of their conveyance, and the latter so corrected is decreed to be the first incumbrance upon the property. *Fenwick vs. Bruff*, 107.
2. A deed of lands in the State of Maryland acknowledged in the District of Columbia, before a justice of the peace of said State of Maryland, but who is not authorized by law to take acknowledgments of deeds in the said District of Columbia, is defective and void. *Cowan vs. Beall*, 270.

3. If such deed has been recorded and all the purchase-money paid, the court will direct the vendor to execute a valid deed of the premises; and, in default of compliance with such decree, that the decree stand for a conveyance of the property. *Ib.*
4. The sale of real estate under a deed of trust as a whole, when it is capable of being divided, and when serious injury has been occasioned by that way of selling, furnishes just ground for relief in a court of equity. *Hill vs. Shoemaker et al.*, 305.
5. If the property has been consolidated and improved into a paper-mill (after the deed was made) with fixed machinery and water-power to operate the same, the sale will be set aside if it is made without reference to this altered condition of the property. *Ib.*
6. The creditors of a deceased person may come into a court of equity and ask to reach the property belonging to his estate and apply it to the satisfaction of their claims, without having previously established the amount of their debts by judgments at law. The administration of the assets of a deceased person is a well-established rule in equity jurisdiction. *Offutt et al. vs. King et al.*, 312.
7. Where all the purposes and conditions of a trust created by a will and codicil are exhausted, equity will distribute the estate among the devisees, who are also next of kin, although the period for the expiration of the trust has not arrived. The court will not extend the trust further than is necessary to support those of its purposes which are valid in law. *Coltman et al. vs. Moore et al.*, 197.
8. When a case involves both discovery and account, it is within the jurisdiction of a court of equity. *Hoss vs. Wilson*, 474.
9. Where a bill is filed to compel the defendant to perform a written memorandum for the sale of real property, and the defendant denies that he executed the alleged memorandum, but admits that the signature thereto is his, and the grantee who has assigned all his interest to other parties, who, in turn, have assigned to the complainant, denies that he ever purchased or agreed to purchase the premises, but admits that the agreement is in his handwriting and that the defendants signed it, and the same is corroborated by other circumstances, the law attaches a force to the writing which the evidence of the parties cannot overthrow, and the contract for the sale will be recognized and enforced. *Sanborn et al. vs. O'Donoghue et al.*, 554.
10. The defendant, after making the memorandum, executed a deed of trust on the premises to secure the payment of the sum of \$4,000, and the trustee is a party to the suit, the complainants were decreed to bring the purchase-money into court to be applied, in the first instance, to the extinguishment of the trust-deed, and that defendant receive the balance, and that he execute a conveyance of the property. *Ib.*

11. The lease was for a term of five years, at the annual rent of \$1,200 payable in monthly installments of \$100. The tenant threatened to quit the premises after being in possession a few months, having paid all the rent due for the portion of time he occupied the premises, and it was held that a bill in equity to enforce the landlord's lien by attaching all the goods and chattels of the tenant in order to secure or pay the whole of the rent for the entire term of the lease, could not be maintained. *Joyce vs. Wilkenning*, 567.
12. A bill in equity can be filed to enforce a vendor's lien for the purchase-money of land sold and conveyed, only when the complainant has obtained a judgment at law for the amount due; or when he avers in his bill such facts as will show that he cannot have a full, complete, and adequate remedy at law. *Ford et al. vs. Smith*, 592.
13. Where the answer sets up that there is no such averment in the bill, the court will entertain the question of jurisdiction at the hearing and dismiss the bill. *Ib.*
14. This principle is peculiarly appropriate in a case where the existence of the debt is disputed, and the conflict of testimony leaves it doubtful whether there is anything due. *Ib.*
15. A bill in equity which seeks to set aside a conveyance of real property by which one of the defendants became possessed of an estate *per autre vie*, and which also seeks to charge the same defendant with the taxes assessed upon the property, is not multifarious, but a proper form of pleading for the purpose of economy in litigation, and it is the duty of the person who owns the estate *per autre vie* to keep the property in repair and pay the taxes as they fall due, and if he fails to perform this obligation the court will decree the taxes due and unpaid a lien upon the life-estate, and will order the sale thereof in case of his default to pay such taxes within a specified period. *Elliot, &c., vs. Lamon et al.*, 647.

EQUITY OF REDEMPTION.

See JUDGMENT, 1.

EVIDENCE.

See PARTIES, 3.

PROMISSORY NOTES, 2.

1. If a party on cross-examination asks about a matter not stated in the direct examination, this court will not for that reason reverse the judgment when the bill of exceptions does not show the answer of the witness, or that it was improper or unfavorable to the party making the objection. *Eastwood vs. Creecy et al.*, 232.
2. When written instruments in the testimony are declared by the opposite party to be forgeries, a court of equity will determine their genuineness by an inspection of the instruments, the preponderance of the evidence, and will also examine the acts and circumstances of the parties. The opinion of experts as to the genuineness of signatures is the most unsatisfactory of any proof admitted by a court. *Cowan v. Beall*, 270.

3. On February 5, 1867, Congress authorized the Baltimore and Potomac Railroad to construct a lateral branch of their road into the District of Columbia, and prescribed how the road might pass along the public streets and alleys to the point of terminus within the city of Washington, and in no way subjected the railroad corporation to the control or supervision of the municipal government of the said city; and it is, therefore, held, that said corporation was exempted from all interference from such city government, and that it was erroneous to admit in evidence on the trial an ordinance of the common council in reference to the use of a street by said company. *Barnes vs. District of Columbia*, 322.
4. Evidence may be given under the general issue, showing misrepresentations in the statements made in an application for life-insurance, which by the terms of the instrument constitute part of the policy. *Jacobs vs. National Life-Insurance Company*, 484.
5. The act of March 3, 1865, providing "that in actions by or against executors, &c., neither party shall be allowed to testify against the other, as to any transactions with, or statements by, the testator," &c., applies to actions in the supreme court of the District of Columbia. The principle is again announced, that this is a court of the United States. *Noerr vs. Brewer*, 507.
6. An expert cannot give his opinion whether upon the face of a conveyance of real estate it covers the premises in controversy. *Norment vs. Fastnacht*, 515.
7. A witness was permitted to testify what the insured told him, where the door was opened to its introduction by the cross-examination of the witness on the other side. *Jacobs vs. National Life-Insurance Company*, 652.

EXCEPTIONS.

Where several instructions are refused, but the same points are fully given in other prayers that are allowed, there is no ground for exceptions. *Kimbrow vs. First National Bank*, 415.

EXECUTORS.

See DEVISE, 2, 3, 4, 5.

A power to sell real estate for the payment of debts and the education of children contained in a will, may be executed by a surviving executor, without reciting such power in the executing deed of conveyance; provided that the intent to execute the power is shown by the circumstances of the case. By the omission of the usual recitals in a deed that the grantor is a surviving executor and that it was executed in pursuance of a power, such deed, though not in an approved form, is not for that reason void. *Coombs vs. O'Neal*, 405.

EXPERTS.

See EVIDENCE, 6.

FORECLOSURE.

See MORTGAGE, 2, 3.

FOURTEENTH AMENDMENT.

See ELECTIVE FRANCHISE, 3.

CONSTITUTIONAL LAW, 3.

FRAUDULENT CONVEYANCE.

1. A voluntary conveyance to a wife by a husband of the bulk of his property is void as against existing creditors. *Walter, &c., vs. Lane et al.*, 275.
2. There is a presumption of law and fact that the grantor in such a deed intends a fraud upon his creditors, and the mere declaration of the parties to such a transaction that they acted in good faith will not be sufficient to repel this inference. *Ib.*
3. As respects subsequent creditors, the conveyance is not void unless there is intentional fraud contemplated by the grantor in the creation of future debts. *Ib.*
4. If, however, in a court of equity, a conveyance is set aside as being voluntary and fraudulent against existing creditors, the creditors whose debts have been contracted since the execution of such conveyance may come in and share in the benefit of the fund thus created. *Ib.*
5. The statute of 13 Elizabeth in regard to frauds and perjuries is the law of this District, and declares all conveyances void which are made to defraud such creditors as the grantee is indebted to at the time; but in a case of actual fraud as respects subsequent creditors, the deed will also be declared void. *Ib.*
6. If a voluntary conveyance be made with a view of becoming indebted, that fraudulent intent may be inferred from the fact that the grantor contracted debts immediately after he made it and has not paid them. *Ib.*
7. When a person is indebted in a small amount, and has ample means, and is not embarrassed in his circumstances, he may make a gift in favor of his wife and children, and it cannot be impeached, for want of consideration, by his creditors. *Ib.*
8. A deed of trust executed for the benefit of the grantor's wife and children, in consideration of love and affection, is not void on its face as to creditors by reason of a provision therein by which the grantor reserves to himself the right to sell and dispose of the trust-property as he shall deem most for the advantage of his said wife and children, and where the property, however varied, is to be in the name of the trustee for the benefit and use of the beneficiaries during such grantor's natural life, and at his death is to be equally divided among them. *Offutt et al. vs. King et al.*, 312.

9. A voluntary conveyance is void as to existing creditors, but not as to subsequent creditors, unless there is intentional fraud contemplated by the grantor in the creation of future debts. *Ib.*
10. Where a person is indebted in a small amount and is doing a prosperous business and is not embarrassed in his circumstances, he may make a conveyance in favor of a wife and children, and it cannot be impeached for a want of consideration. Natural love and affection is a good and valid consideration in a deed from a parent to a child. *Ib.*
11. A creditor may apply payments to any of the debts due him, in his discretion, where the debtor has failed to give any direction; and when he makes it, he cannot afterward change the application. Equity, however, will not permit an appropriation to be made by the creditors for the mere purpose of showing an apparent indebtedness at the date of a trust-deed, in order to raise a presumption that it was fraudulently executed by the debtor. *Ib.*

FUTURE ADVANCES.

See TRUST-DEED, 1.

GARNISHEE PROCESS.

The District of Columbia cannot be charged as garnishee upon process of attachment on account of the salary due from it to an officer of the District government. *Deer et al. vs. Lubey, &c.*, 187.

GUARANTEE.

1. A letter of credit, drawn in favor of M., was addressed to a mercantile firm in Baltimore, stating that the parties who had signed it were willing to become sureties for M. in the sum of \$1,200 for the faithful performance of his duties as their agent. *Held*, that such letter was an offer for a future credit or act, and that notice was necessary to be given to the guarantors by the person giving the credit, within a reasonable time, that he had accepted the offer, and intended to act upon the faith of it; *held, also*, that if such person sold goods, or gave credit to M. on the faith of such guarantee, without giving notice, the guarantors were not liable. *Henderson et al. vs. Reilly et al.*, 25.

HOUSE OF REPRESENTATIVES.

See CONTEMPT, 1.

PARLIAMENTARY LAW, 1.

HUSBAND AND WIFE.

See DEVISE.

TREASURY DRAFT.

1. By the rules of the common law, a married woman to whom a draft, promissory note, or other promises are made, cannot maintain an action thereon in her own name during coverture. When the cause of action is in her own right, her husband was required to be joined with her in the suit. *Kimbrow vs. National Bank*, 61.

2. The act of Congress regulating the rights of married women in this District has not changed the rules of the common law, so as to enable a married woman to maintain an action in her own name, upon a chose in action which she had prior to the passage of the law. *Ib.*
3. At common law the husband owned the personal estate of his wife, and had the right to reduce it to possession. The act of Congress referred to is not to be construed so as to effect the vested rights of the husband, by giving it a retroactive operation. *Ib.*
4. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors. *Mitchell vs. Seitz*, 480.
5. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by fund. which he had furnished. *Ib.*
6. The earnings of a married woman are still the property of the husband, notwithstanding the act of Congress permitting married women to obtain and hold property in this District. *Ib.*

INDORSEMENT.

See PROMISSORY NOTES.

BILLS OF EXCHANGE.

MUNICIPAL VOUCHER.

INJUNCTION.

1. A court of equity will not interfere by injunction when the consequences which might ensue would be little less injurious than those to be prevented by this process. *Harkness et al. vs. Board Public Works*, 121.
2. S. agreed that D. D. and B. should negotiate certain certificates, to become due him from the board of public works, so far as he might require; and it was held that the amount of certificates to be disposed of depended upon his discretion, and he could not, therefore, be enjoined from receiving them himself. *Barber vs. Strong et al.*, 574.
3. S. gave D. and B., two of the parties to the above agreement, a power of attorney to receive all certificates due him from said board of public works, and it was considered that the two instruments ought to be construed as one, and that S. had, therefore, the same right to receive the certificates himself, should he so require, instead of the attorneys. *Ib.*
4. The complainant alleges that he became surety on the bond of S. in consideration of an agreement that the power of attorney was to be held as his indemnity. The answer denies such agreement, and, there being no proof to sustain it, the injunction was properly refused. *Ib.*

5. No liability can ever arise on complainant's suretyship, if S. fulfills the contract for the performance of which the bond was given.—WYLIE, J. *Ib.*
6. A preliminary injunction is not a final order or decree, and is, therefore, not appealable.—OLIN, J. *Ib.*
7. The power of attorney has a different object from the contract, and, the parties not all being the same, the two instruments do not constitute one agreement; there is consequently a misjoinder of parties defendant in the bill, and for that reason it is incapable of sustaining an injunction.—MACARTHUR, J. *Ib.*

INSURANCE OF LIFE.

1. A policy of life-insurance contained a stipulation that it should be void if a certain declaration made by or for the person whose life was insured, "and upon the faith of which this agreement was made, shall be found in any respect untrue." The declaration referred to was made for the purpose of procuring the policy, and contained answers to certain inquiries respecting the health of such person, and as to his having had certain diseases therein enumerated. *Held*, that such declaration constituted a part and portion of the contract, and the statements therein were made material by the contract, and the only question of fact respecting the same that can be determined by a jury is whether such statements are true or false, and not whether they are material; *held, also*, that it was misdirection to instruct the jury that, in order to avoid the policy, it was necessary to show that the assured himself knew that he was misrepresenting in making such statements. The question being upon this subject whether such statements were untrue in point of fact, not whether the assured knew them to be false; *held, also*, when a policy has lapsed for non-payment of premium, and is afterward re-instated upon the condition that such re-instatement shall be void if the assured shall not then be in sound health, there can be no doubt that the policy and the representations upon which it is based and the renewal are to be considered together. The renewal of a contract necessarily imports a continuance of its terms. *Day vs. Mutual Insurance Company*, 41.
2. A clause in a policy of life-insurance that the company would pay the amount insured for, if in the opinion of their surgeon-in-chief the party did not die of intemperance, is a condition precedent to the right of the plaintiff to recover, and on the trial she must prove the decision of the surgeon, or account for its absence, as part of her case. *Campbell vs. American Popular Life-Insurance Company*, 246.
3. The agreement to refer the cause of death to the opinion of the surgeon-in-chief is not void as contravening public policy, or because it has the effect of ousting the courts of their jurisdiction. *Ib.*
4. It is only where the agreement to refer is incomplete and executory, and in which no arbitrators are chosen, that the courts will not permit their jurisdiction to be taken away; for in such case no reference has been settled by the parties that can be enforced in equity. *Ib.*

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5. A person obtaining a policy of life-insurance may agree that the surgeon-in-chief of the company shall decide whether one of the conditions upon which the policy issued has been complied with, and his decision will be binding. *Campbell vs. American Popular Life Insurance Company*, 471.
 6. Where one of the conditions in the policy is that the insurance-money is to be paid, if, in the opinion of the surgeon-in-chief of the company, the party insured did not die of intemperance, nor by any disease produced or aggravated by intemperance, it was held that this was a valid condition-precedent, and that its performance must be averred or its non-performance accounted for. *Ib.*
 7. If, however, the surgeon is also a stockholder whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition. *Ib.*
 8. In an action on a policy of life-insurance the plaintiff, who is the wife of the person insured, is not absolutely concluded by the statement of another party in an affidavit that accompanied the preliminary proofs as to the cause of her husband's death, it appearing doubtful whether she was aware of the contents of said affidavit, and no such evidence being required by the terms of the policy. *Day vs. Mutual Benefit Life-Insurance Company*, 598.
 9. The annual premium not having been paid on the 16th of July, 1870, when it became due, the assured applied to the agent of the company on the 1st of October to have the policy re-instated; he paid the premium at the same time and furnished certificates of his health, made by himself and the physician of the company. A renewal receipt was delivered to him on the 14th of the said month of October, and it was held that the assured was under no obligation to furnish the company with further statements of any variation in his physical condition, intermediate the 1st of October and the date of the delivery of the renewed receipt. *Ib.*
 10. A declaration on a policy of life-insurance stated the consideration to be the payment of premiums quarterly. The policy proved at the trial was expressed to be in consideration of said premiums, and of the statements and declarations made in the application for the policy. *Held*, that the variance was not material. *Jacobs vs. National Life-Insurance Company*, 652.
 11. The application presented to the company, when the insurance was effected, is no part of the plaintiff's course of action, and need not be set forth in the declaration. *Ib.*
 12. It is competent for a life-insurance company to waive forfeitures, so as to give renewed effect to a life-insurance, where the premium has not been paid at the time it was due; and a stipulation in a life-policy that it shall cease and determine if any subsequent premium shall not be paid when due, is waived by the act of the company in receiving and retaining the premium after that time. *Ib.*

13. A witness was permitted to testify what the insured told him, where the door was opened to its introduction by the cross-examination of the witness on the other side. *Ib.*
14. A condition in a policy of life-insurance that it is to become null and void in case the insured shall die by his own hand or act, voluntarily "or otherwise," the use of the latter word is too vague and intangible to admit of practical application, and the court will not undertake to enforce a provision so uncertain. *Ib.*

INTEREST.

1. A coupon payable on presentation and demand can bear interest only from the date of its maturity and after payment has been demanded and unjustly refused; and the coupons being payable out of specified revenues, it is necessary, in a suit to establish the lien of the bondholders, to allege and prove the existence of the fund, and a demand of payment is properly refused when there are no such revenues on hand. *Corcoran vs. Chesapeake and Ohio Canal Company*, 358.
2. Under our statute, where the debtor has agreed in writing to pay interest exceeding six per cent. per annum, but not greater than ten, till the maturity of his obligation, but the contract is silent as to any rate of interest beyond that period in case the debtor should be in default, no more than interest at the rate of six per cent. per annum can be recovered for the time subsequent to the maturity of the obligation. *Sullivan vs. Snell et al.*, 585.

JUDGMENT.

A judgment creates a lien on an equity of redemption of real estate from the time it is recorded. *National Bank vs. Morsell*, 156.

JUDGMENT CREDITOR.

See DOWER, 1, 2,
DEED OF TRUST, 3.

JUDICIAL POWER.

See CONSULAR COURTS, 1.

JURISDICTION.

The jurisdiction of the circuit and criminal courts previously existing in the District of Columbia was transferred to this court by the organic act of March 2, 1863; and the relief now granted to a party convicted of crime in the criminal court is an appeal to the general term instead of the writ of error which was the mode of practice under the former jurisdiction. *United States vs. Wood*.

JUSTICES OF THE PEACE.

See CERTIORARI, 1, 2.

LACHES.

See MISTAKE, 3.

MORTGAGE, 1.

LANDLORD AND TENANT ACT.

1. In case of the sale of real property under a deed of trust, the purchaser, as matter of law, becomes vested with the title, and if the person who executed the trust-deed remains in possession of the premises without any agreement to that effect, he becomes, by operation of the landlord and tenant act, tenant by sufferance to such purchaser, and, upon being notified to quit in thirty days, is liable to be turned out by proceedings under that statute. *Luchs vs. Jones*, 345.
2. The judgment of the special term in cases of appeal from justices of the peace is final; and it has the same effect in cases arising under the landlord and tenant act as in other cases *Ib.*
3. A landlord can claim the lien conferred by the act of Congress of February 22, 1867, for rent due and in arrear, and also for any installment of rent, although the tenant has occupied the premises only for a part of the time during which said installment is accruing. *Joyce vs. Wilkenning*, 567.
4. Where the lease is for a period of several years, and the rent is payable monthly, and the tenant is about to remove his goods and chattels from the leased premises, the landlord may issue his attachment under said act, and serve it on said chattels for rent in arrear, and for rent which will be due and payable for the month during a part of which the tenant occupied the premises. *Ib.*
5. The lease was for a term of five years, at the annual rent of \$1,200, payable in monthly installments of \$100. The tenant threatened to quit the premises after being in possession a few months, having paid all the rent due for the portion of time he occupied the premises, and it was held that a bill in equity to enforce the landlord's lien by attaching all the goods and chattels of the tenant in order to secure or pay the whole of the rent for the entire term of the lease, could not be maintained. *Ib.*

LEASE.

See LANDLORD AND TENANT—LIEN.

1. A lease of real estate in which the lessors are described as "acting as a church-extension committee by authority and on behalf of the General Assembly of the Presbyterian Church, Old School," parties of the first part, and who executed the lease in their individual names and seals, and which contained reciprocal covenants to be performed by the parties respectively, one of which was to pay rent on the part of the lessee to the lessors, as in their own right, is a nullity. It is a nullity as to the owner, because it is not his contract; and as to the lessors, because they have no estate in the property; and as to the lessee, because it is not binding on the other party. And the rule that a tenant shall not be allowed to dispute his landlord's title has no application to such a case. *Stott vs. Rutherford*, 7.

2. By lease for years it was provided that if the premises should be destroyed by fire the rent was to cease until the landlord should put them in good order and condition, but the landlord did not otherwise covenant to rebuild, and the building was destroyed by fire during the term. *Held*, that, as the lessor was not obliged to rebuild, by mutuality of obligation, the tenant could not be held liable for rent after the house was rebuilt unless he elected to enter into possession of the restored premises; *held, also*, that in such case the destruction of the premises by the fire put an end to the lease; *held, also*, that it is a sound principle, where the lease contains no covenant to the contrary, destruction of the subject-matter of a lease will terminate the lease. *Smith vs. Pettit*, 179.
3. A covenant in a lease that the tenant shall keep the premises in good order, and deliver the same in good order as "they are now," on the expiration of the lease, binds the tenant to rebuild in case the premises should be destroyed by fire, and if he abandons them, and the landlord takes possession and erects a more costly and commodious structure, the tenant cannot maintain an action to compel him to pay the difference between the rental value of the property before and after the fire. *Ib.*
4. Leased premises were used as a hotel, and the lessee executed trust-deeds on the furniture to secure the parties from whom he purchased and to other creditors. Subsequently the landlord accepted in lieu of the lessee another tenant, who bought out the lessee and assumed the payment of all rent in arrear, and of all liens upon the furniture. Upon the faith of this agreement the tenant paid all the back rent, and the rent accruing for some time afterward, to the landlord. He also paid off a large portion of the claims secured by the deeds of trust. *Held*, that the balance due upon such trust-deeds had priority over the landlord's lien for rent, and that there was a change of tenantry as well as of property in the furniture. *White vs. Freedman's Bank*, 509.
5. A landlord will lose his lien by conduct which misleads bona-fide purchasers for valuable consideration. *Ib.*
6. Where trustees have moneys in their hands claimed by a landlord upon his lien for rent, and by creditors having trust-deeds on the furniture on the rented premises, a bill of interpleader will be sustained when the fund is not sufficient to pay both. *Ib.*

LEGISLATIVE ASSEMBLY.

The act of the legislative assembly of the District of Columbia, passed June 23, A. D. 1873, and entitled "An act to regulate shows and exhibitions in the sale and disposals of seats," is a vexatious and unlawful interference with the rights of private property, and as such the legislative assembly was incompetent to enact it. *District of Columbia vs. Saville*, 581.

LIBEL AND SLANDER.

1. On the trial of an action of slander the plaintiff must prove that the defendant uttered the words set out in the declaration, or expressions of substantially the same meaning. *Pollard vs. Lyon*, 296.
2. Words which if true would subject the plaintiff to an indictment for crime involving moral turpitude, are in themselves actionable without averment or proof of special damage. *Ib.*
3. Since the act of Maryland of 1749 removing the infliction of corporal punishment for fornication, and that of 1786 repealing all proceedings against that offense, words spoken of an unmarried woman imputing to her that act are not actionable in themselves. *Ib.*
4. When the words complained of in the declaration are not actionable, and no special circumstances are set up, and there is a verdict in favor of the plaintiff, the judgment will be arrested. *Ib.*
5. The police court of the District of Columbia has no jurisdiction in case of a criminal prosecution for libel. *United States vs. Buell*, 502.

LICENSE.

See DOG, 1.

LETTER OF CREDIT.

See GUARANTEE, 1.

LIEN.

See ATTORNEY AT LAW, 2, 5.

JUDGMENT, 1.

LEASE, 4, 5, 6.

TRUSTS, 6, 7, 8.

VENDOR'S LIEN, 1, 2, 3.

MECHANIC'S LIEN.

1. The State of Maryland had obtained first liens upon the property and revenues of the Chesapeake and Ohio Canal Company. The legislature of the State afterward passed an act authorizing the company to borrow upon its bonds a sum not exceeding \$1,700,000, and the State waived her prior liens, so as to make said bonds and the interest to accrue thereon preferred liens on the net revenues of the company until the bonds and interest should be paid. The bonds were payable in 35 years, with interest at six per cent., payable on the first day of January and July in each year, and coupons were annexed in the usual form. On a bill filed by the bondholders to establish their lien on the revenues on an alleged default of payment: *held*, that the State waived her liens only as to the principal of the bonds with simple interest, and that the interest on the coupons cannot be paid until after the liens of the State of Maryland are satisfied. *Corcoran vs. Chesapeake and Ohio Canal Company*, 358

2. A decision by the court of appeals of Maryland that the waiver of the State's lien is only in favor of the principal of the bonds and simple interest thereon, and does not extend to interest that may accrue on coupons attached to the bonds, although not matter of estoppel in this case, is nevertheless entitled to be received with very great respect.
3. By the seventh section of an act with regard to mechanics' liens upon buildings, it is provided "That the liens created in pursuance of the provisions of this act shall have precedence over all other liens or incumbrances which have attached upon the premises subsequent to the time at which said notice was given." *Held*, that the mechanic's lien begins only from the time of filing his notice, and a purchaser at any time before the giving of such notice takes title unaffected thereby. *Cotton vs. Holden*, 463.
4. The fact that the mechanic is openly doing his work is not notice to any one, for it is not made so by the statute. *Ib.*
5. A landlord can claim the lien conferred by the act of Congress of February 22, 1867, for rent due and in arrear, and also for any installment of rent, although the tenant has occupied the premises only for a part of the time during which said installment is accruing. *Joyce vs. Wilkenning*, 567.
6. Where the lease is for a period of several years, and the rent is payable monthly, and the tenant is about to remove his goods and chattels from the leased premises, the landlord may issue his attachment under said act, and serve it on said chattels for rent in arrear, and for rent which will be due and payable for the month during a part of which the tenant occupied the premises. *Ib.*
7. A mechanic's lien under our statute begins only from the time of filing the notice, and a purchaser at any time before such notice is filed takes a good title. *Tucker et al. vs. Ormes*, 652.

LIVE FREIGHT.

See COMMON CARRIER, 2, 3, 4, 5, 6, 7.

MARRIED WOMEN.

1. By the rules of the common law, a married woman to whom a draft, promissory note, or other promises are made, cannot maintain an action thereon in her own name during coverture. When the cause of action is in her own right, her husband was required to be joined with her in the suit. *Kimbro vs. National Bank*, 61.
2. The act of Congress regulating the rights of married women in this District has not changed the rules of the common law so as to enable a married woman to maintain an action in her own name, upon a chose in action which she had prior to the passage of the law. *Ib.*
3. At common law the husband owned the personal estate of the wife, and had the right to reduce it to possession. The act of Congress referred to is not to be construed so as to affect the vested rights of the husband, by giving it a retroactive operation. *Ib.*

4. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors. *Mitchell vs. Seitz*, 480.
5. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds, and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by funds which he had furnished. *Ib.*
6. The earnings of a married woman are still the property of the husband, notwithstanding the act of Congress permitting married women to obtain and hold property in this District. *Ib.*

MARYLAND.

1. The State of Maryland had obtained first liens upon the property and revenues of the Chesapeake and Ohio Canal Company. The legislature of the State afterward passed an act authorizing the company to borrow upon its bonds a sum not exceeding \$1,700,000, and the State waived her prior liens, so as to make said bonds and the interest to accrue thereon preferred liens on the net revenues of the company until the bonds and interest should be paid. The bonds were payable in 35 years, with interest at six per cent., payable on the first day of January and July in each year, and coupons were annexed in the usual form. On a bill filed by the bondholders to establish their lien on the revenues on an alleged default of payment: *held*, that the State waived her liens only as to the principal of the bonds with simple interest, and that the interest on the coupons cannot be paid until after the liens of the State of Maryland are satisfied. *Corcoran vs. Chesapeake and Ohio Canal Company*, 358.
2. A coupon payable on presentation and demand can bear interest only from the date of its maturity and after payment has been demanded and unjustly refused. *Ib.*
3. The coupons being payable out of the net revenues, it is necessary in a suit to establish the lien of the bondholders to allege and prove the existence of the fund, and a demand of payment is properly refused when there are no such revenues on hand. *Ib.*
4. A decision by the court of appeals of Maryland that the waiver of the State's lien is only in favor of the principal of the bonds and simple interest thereon, and does not extend to interest that may accrue on coupons attached to the bonds, although not matter of estoppel in this case, is nevertheless entitled to be received with very great respect. *Ib.*

MARYLAND ACTS OF ASSEMBLY.

The act of Maryland of 1720, chapter 24, section 2, declaring that a creditor shall not prosecute an action on an administrator's bond before *non est inventus* or *nulla bona* has been returned, has no application to an action in the name of heirs at law, upon said bond, to recover the distributive share of the estate. *United States, &c., vs. King*, 499.

MECHANIC'S LIEN.

See LIEN, 3, 4.

1. By the seventh section of an act with regard to mechanics' liens upon buildings, it is provided, "That the liens created in pursuance of the provisions of this act, shall have precedence over all other liens or incumbrances, which have attached upon the premises subsequent to the time at which said notice was given." *Held*, that the mechanic's lien begins only from the time of filing his notice, and a purchaser at any time before the giving of such notice takes title unaffected thereby. *Cotton vs. Holden*, 463.
2. The fact that the mechanic is openly doing his work is not notice to any one, for it is not made so by the statute.
3. A mechanic's lien under our statute begins only from the time of filing the notice, and a purchaser at any time before such notice is filed takes a good title. *Tucker et al. vs. Ormes et al.*, 652.

MEMBER OF CONGRESS.

See SERVICE OF PROCESS, 1.

WITNESSES, 3.

MISTAKE.

1. A deed of trust containing a mistake in having the word *west* instead of *east*, contrary to the intention of both parties, in the beginning of the description of the premises conveyed, will be corrected on a bill in equity filed for that purpose by the grantees, not only as against the grantors, but against the parties to a prior deed of trust upon the same premises of which said grantees had no knowledge or notice, and which was not recorded for over a year subsequent to the record of their conveyance, and the latter so corrected is decreed to be the first incumbrance upon the property. *Fenwick vs. Bruff*, 107.
2. K. purchased land of S. and gave instructions to a scrivener to prepare a deed that should convey one portion of the premises to him upon certain trusts, and the remainder in fee-simple. By a mistake of the scrivener the whole of the premises was conveyed upon trusts. *Held*, that the deed should be reformed in order to give effect to the intentions of the parties. *Kirk vs. Zell et al.*, 116.
3. The deed was executed in 1856, and the bill filed in 1872; but K. did not discover the mistake till 1861, and was absent from the city till 1865. He had control of the premises, made improvements, paid taxes, and carried on business there ever since. No adverse interest had been acquired, and no one injured or misled, and the mistake being clearly established, the court under these circumstances excused the *laches* in bringing suit and granted the relief asked for. *Id.*

MORTGAGE.

1. A mortgagor, or those claiming under him, who delay for a period of eight years before filing a bill to redeem from the purchasers at a

foreclosure sale, and where such purchasers, believing in good faith their title to be perfect, have expended many thousands of dollars in permanent improvements upon such property, such mortgagor or those claiming under him will not be permitted to redeem in view of such laches without allowing the value of such improvements; and this will be made a condition of their right to redeem. *Fraser et al. vs. Prather et al.*, 206.

2. The purchaser at a foreclosure sale acquires no estate in consequence of his bid or the payment of the purchase-money, nor has the trustee appointed by the court to sell the premises any authority to make the purchaser a deed unless the sale is ratified and confirmed by an order of court. *Ib.*
3. A foreclosure suit commenced during the life-time of the mortgagor who is non-resident, and notice by publication has been made as required by law, a decree in such suit for the sale of real estate in this jurisdiction cannot be impeached on the ground that the mortgagor was dead at the time the decree was passed. *Ib.*

MORTGAGE OUTSTANDING.

See EJECTMENT, 1, 2.

MUNICIPAL VOUCHERS.

1. A claim against the late corporation of Washington, commonly called a voucher, consisting of a bill for work performed by plaintiff for the corporation, together with certificates of the proper officers that it was duly approved and allowed for the sum of \$6,096.75, is not strictly a commercial instrument; but where it has been indorsed in blank by the plaintiff and delivered to a broker as security to raise money, and no mark put on it to designate a wish to control it, or to restrict the indorsement, and as paper of this kind is extensively used for the purpose of borrowing money: *held*, that the plaintiff could not maintain replevin to recover the voucher from an innocent *bona-fide* holder for a valuable consideration, without tendering him the amount paid therefor. *Talty vs. Freedman's Trust Company*, 522.
2. Where the plaintiff made his promissory note for \$3,000, payable to his own order, and indorsed it and delivered it to a broker to get discounted, giving him the voucher as security, and the note was discounted and the proceeds paid plaintiff, and the broker claimed that the voucher was given upon an agreement that he might sell and dispose of it at any time for 90 cents on the dollar, and the plaintiff claimed that he was not to sell it until after maturity and non-payment of the note, and the broker sold it to the defendant before such maturity, for a valuable consideration, and without any notice or knowledge of such arrangement: *held*, upon this state of facts it was proper for the justice who tried the case below to instruct the jury to return a verdict for defendant, as there was no proof of tender before suit brought. *Ib.*

NEGLIGENCE.

1. The Washington Gas-Light Company is authorized to use the streets of the city for the purpose of laying gas-pipes, but it is the duty of the company to perform the work so that other persons may receive no injury through the negligence of the company, or of its agents, in such use of the public streets. *Dillon vs. Washington Gas-Light Company*, 626.
2. Where an individual has received an injury by falling into a trench dug in a traveled street and imperfectly filled up, the company will not be relieved from liability therefor, although the work has been approved of and accepted by the officers of the District government. *Ib.*
3. It is the duty of the company to put the street in as good condition as it had previously been, and also to exercise a careful foresight so as to prevent any injury afterward which might be occasioned to the work by storms and rain-falls, and which would render the work dangerous to persons traveling on the street. *Ib.*

NEW TRIAL.

1. An appeal does not lie to the general term from an order made at the circuit setting aside a verdict for the plaintiffs and granting a new trial. *Philp et al. vs. Gardner et al.*, 165.
2. The decision of the justice holding the criminal court, overruling a motion for a new trial, is not a proper subject of review on an appeal to the general term. *United States vs. Wood*, 241.
3. A motion for a new trial is an application to the sound legal discretion of the court in which the trial took place, and is not the subject of error or appeal. *Ib.*
4. Whether in case of abuse of judicial discretion so palpable in its character as to involve corruption or imbecility, the matter would be without remedy, *quaere*. *Ib.*
5. Alleged misconduct of a juror considered. *Ib.*
6. A motion for a new trial on the ground that the court erred in its charge to the jury, where the rulings complained of were not excepted to before verdict, nor even after, will be overruled. *Doddridge vs. Gaines*, 335.
7. The legal effect of an order that the motion for a new trial be heard at the general term in the first instance, is equivalent to a refusal of the presiding justice to entertain the motion upon his minutes of the trial; and the case can then only be heard at the general term upon a bill of exceptions to be settled by the justice. *Ib.*
8. The motion may be made upon the minutes of the justice at the term at which the trial is had, and must be determined at the term in which it is made; otherwise, it will be regarded as denied or refused to be entertained. *Ib.*

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9. If a motion for a new trial be made on the ground that the verdict is against evidence or the damages excessive, and it is denied by the justice presiding or he orders it to be heard at the general term in the first instance, if the moving party desires the merits of his motion to be reviewed by the court in general term, he must prepare a case to be settled as prescribed by the rules of the court. *Ib.*
 10. An order granting a new trial upon either of the grounds mentioned in section 8 of the act organizing this court is not appealable, but the denial of these motions involves the merits of the suits, and an appeal then lies to the general term. *Ib.*

NON-INTERCOURSE ACT.

An executrix indorsed the note in Alabama during the late war, and gave it to a messenger, who conveyed it through the military lines and delivered it to the plaintiff at Leavenworth, in the State of Kansas, and there was no evidence to show that the indorsement was not of a commercial character. *Held*, that the indorsement and transmission of the note was unlawful under the non-intercourse act of July 13, 1861, and passed no title to the plaintiff. *Russell vs. Russell*, 263.

NOTICE.

See GUARANTEE, 1.

SERVICE BY PUBLICATION, 1, 2.

LIEN, 4.

NUISANCE.

1. The 26th section of the act of Congress to provide for a government for the District of Columbia designates a board of health, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; but it does not confer power upon said board of health to declare anything or any condition of things a nuisance, injurious to health, which was not a nuisance by the rules of the common law, or made such by some statute governing the District. *Bates vs. District of Columbia*, 433.
2. Where the defendant and his ancestors had prosecuted continuously the business of manufacturing soap and candles in the same place for a period of more than forty years, *it was held*, it could not be removed unless the facts upon which the question of nuisance depended were tried by due process of law, consisting of indictment and trial by jury; *and it was also held*, that the board of health had no authority to pass ordinances under which the defendant was prosecuted by information in the police court for the purpose of recovering a fine or penalty for maintaining the alleged nuisance. *Ib.*

OUTSTANDING TITLE.

See EJECTMENT.

 PARLIAMENTARY LAW.

The House of Representatives has power to commit for contempt, and when a party is found guilty of a contempt the order of the House directing his commitment is a complete protection to the Speaker who orders him into custody of the Sergeant-at-Arms. *Stewart vs. Blaine*, 453.

PARTIES.

See INJUNCTION, 7.

1. Individual tax-payers whose property has been separately assessed have not that community of interest which will allow them to unite in a bill of complaint to restrain the collection of taxes alleged to be illegally assessed, on the ground of preventing a multiplicity of suits. *Harkness vs. Board of Public Works*, 121.
2. On the trial of an action, *ex contractu*, if it be shown that all the parties to the contract have not joined in the action as plaintiffs, the defendant may take advantage of the omission either by plea in abatement or as ground of nonsuit at the trial. *Snyder et al. vs. Finley*, 220.
3. Where there is a conflict of testimony over the question whether all the parties to the contract have joined as plaintiffs in the action, it is proper to request the court to instruct the jury, if they believe from the evidence that a party to the contract has been omitted, then the plaintiff cannot recover. And it is no answer to such a request, and instead thereof, for the court to instruct the jury that if they believe from the evidence the debt was due to plaintiff, they must find for the plaintiff. *Ib.*
4. The defendant is a Virginia railroad-corporation, and had an agreement with a similar corporation in the District of Columbia, by which the defendant ran its trains over the track of the latter, into said District, and through the city of Washington, said trains being in the charge of the servants and agents of the defendants except the conductor, who was in the employment of the company whose track the defendant so used. *Held*, that the defendant is liable for a personal injury produced by carelessness on the part of defendant's agents in running a train of cars through the city of Washington on the track of the other company. *Mills vs. Railroad Company*, 285.

PARTNERSHIP.

See RAILROAD COMPANIES, 1, 2, 3.

PATENT-LAW.

1. Where a claim was for a flange around and in a plane with the top of a lamp-wick tube, and a prior patent described a like flange "at or near" the top of the tube, but showed it in drawing and model a trifle below the top: *held*, that the patent anticipated the claim, although the purposes or effects of the flanges respectively declared by the claimant and patentee were different.

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2. If two inventions are substantially the same in fact, whatever may be claimed by either party in effect, in contemplation of patent-law they are one.
 3. It is not purpose or results that are the subject of patent, but the instrumentality, contrivance, or machinery through the agency of which results are effected. *In re Rufus S. Merrill*, 301.
 4. A patentee is not entitled to have his patent re-issued unless he shows by satisfactory evidence that the error he seeks to have corrected was owing to "inadvertence, accident, or mistake, and without any fraudulent or deceptive intention," and states particularly wherein the inadvertence, accident, or mistake consisted. *In re Conklin*, 375.
 5. The decisions of the courts sustaining patents against objections for want of such evidence rest upon the principle that it is the province of the Commissioner to determine whether sufficient evidence to that effect has been produced; and that his granting a re-issue is conclusive on that point, and is not open to revision. *Ib.*
 6. The supreme court of the District of Columbia is not governed by this principle in determining an appeal from the decision of the Commissioner of Patents refusing a re-issue, but will require the same evidence of inadvertence, accident, or mistake that should have been produced before him. *Ib.*
 7. If a patent is neither inoperative nor invalid, &c., and the patentee has omitted to claim anything which he has described, it is to be presumed that he has abandoned it to the public. *Ib.*
 8. It being found that the omission in this case was not owing to inadvertence, accident, or mistake, it was presumed that it was intentional, and with the view of abandoning to the public the devices not claimed in the original. *Ib.*
 9. The presumption was held to be materially strengthened because the applicant had waited eighteen years after completing his invention before applying for a patent, and after obtaining it had lived five years without ever intimating that it was defective; but had, on the contrary, made several improvements for which patents were obtained under his direction; and the re-issue was not applied for until four years after his death, and the devices had meanwhile gone into extensive use. *Ib.*
 10. The presumption was held to be strengthened, also, by evidence that the devices sought to be introduced in the re-issue had been in use before the original application was filed, although the evidence might not be sufficient to show want of novelty. *Ib.*
 11. In determining an appeal from the Commissioner of Patents, the supreme court of the District of Columbia will look only into the reasons of appeal, and into the records and proceedings in the case which are applicable to those reasons. *Ib.*
 12. A claim for the combination of an advertisement, not described, with an anchored balloon, refused. The novel organization of co-opera-

tive elements or devices into a useful mechanism is invention within the meaning of the statute, whether the elements be individually old or new. The novelty and utility of a combination in its entirety as a unit are to be regarded, and it must necessarily, therefore, be a fixed and definite organism. The mere discovery that it would be a good thing to attach advertisements permanently to balloons does not come within the law protecting a new and useful apparatus. *In re Gould*, 410.

13. Where two patents have been granted for articles which resemble each other, a presumption arises from the action of the Office that there is such a difference between them that the use of one constitutes no infringement of the patent for the other. *Smith vs. Woodruff*, 459.
14. If one paper-file holds the paper better than another which is patented, and has driven it out of market, that is *prima-facie* evidence that the mechanism is different, and is a new invention, and that the use of it does not violate the patentee's monopoly. *Ib.*
15. A patented combination may be used without infringing the patent, if one of the elements of the combination is omitted, although another is substituted in its place which is new, or performs a substantially different function, or if it was not known as a proper substitute when the patent issued. *Ib.*
16. An improvement described in the claim as "the combination of the hearth-plate of a portable furnace with wrought-iron tubular legs connected together, all substantially as set forth," does not indicate in any degree invention. It is simply the result of the judgment and knowledge which is expected of every competent mechanic, and is not patentable. *In re Baxter*, 520.
17. The properties and advantages of hollow wrought-iron legs as supports for a structure being well known, to substitute them for solid legs in a portable forge is but the application of knowledge already possessed by competent mechanics, and does not require invention. *Ib.*
18. If a chain is attached to a shaft rotated by the same mechanism as the rolls in a rolling-mill, the other end being furnished with grappling-irons by which the heated pile is drawn from the furnace and placed upon a platform suspended from a crane, when it is swung by the crane to the rolls, the whole machinery constitutes the proper subject of a patent. (WYLIE and OLIN, J. J., dissenting. *In re Pennock*, 531.
19. And a patent is valid which describes such machinery, and contains the following claim, viz: "In a rolling-mill, the revolving shaft with its drum-chain and grapple, or any equivalent power-driven hauling mechanism, in combination with a crane, arranged and operating in connection with the said mechanism to receive the fagot from the same and deliver it at the rolls." *Ib.*

20. Whether the inventive faculty has been exercised, is a question of evidence, and is always to be considered in reference to the condition of the art and the result accomplished; and where the combination is new, and the benefit great, the presumption is strongly in favor of originality. *Ib.*

PERFORMANCE OF CONTRACT.

See CONTRACT.

PERPETUITIES.

See WILL, 5, 6 7.

DEVISE, 2, 3 4, 5.

PLEADING.

See PRACTICE, 16.

INSURANCE OF LIFE, 10, 11.

1. In actions of tort for injury to goods, it is material to allege in the declaration the number, quantity, and value thereof, as near as may be. *Dainese vs. Hale*, 86.
2. In an action of debt upon a bond, the declaration should state the breach, and that defendants have neglected to pay the sum due, and that the same remains unpaid at the time of bringing suit. This is a necessary allegation. *Jolley vs. Plant*, 93.
3. A declaration alleging that the defendant by a written agreement was to deliver \$100,000 in bonds to the plaintiff on or before a specified day, upon condition that plaintiff should deliver to defendant a bond in the same amount, without also averring that plaintiff executed its bond and tendered it, is bad on demurrer. An allegation that plaintiff was ready and willing to execute such bond is not sufficient. *Alexandria Railroad Company vs. National Railroad Company*, 203.
4. A demurrer which sets up matter of proof which would be a defense on the merits is irregular in form, and will be set aside. *Alexander vs. Willet et al.*, 564.
5. A bill in equity which seeks to set aside a conveyance of real property by which one of the defendants became possessed of an estate *per autre vie*, and which also seeks to charge the same defendant with the taxes assessed upon the property, is not multifarious, but a proper form of pleading for the purpose of economy in litigation. *Elliot, &c., vs. Lamon et al.*, 647.

POLICE COURT.

See CRIMINAL LAW, 1, 2, 3, 4, 5.

1. The act of Congress of January 17, 1870, confers original jurisdiction of the offense of petit larceny on the police court of the District of Columbia. *United States vs. Cross*, 149.

2. Writ of certiorari is the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded or is proceeding to judgment without jurisdiction. In a case where the police court has no jurisdiction the writ may issue to review such proceedings, although the statute provides for an appeal where there is to be a retrial of the case. *Bates vs. District of Columbia*, 433.
3. The police court of the District of Columbia has no jurisdiction in case of a criminal prosecution for libel. *United States vs. Buell*, 502.

POWERS.

1. A power to sell real estate for the payment of debts and the education of children contained in a will may be executed by a surviving executor, without reciting such power in the executing deed of conveyance; provided that the intent to execute the power is shown by the circumstances of the case. By the omission of the usual recitals in a deed that the grantor is a surviving executor, and that it was executed in pursuance of a power, such deed, though not in an approved form, is not for that reason void. *Coombs vs. O'Neal*, 405.

PRACTICE.

See SERVICE BY PUBLICATION, MORTGAGE, 2, 3.
PLEADING, 4.

1. A final decree passed at a special term of the court in equity cannot be opened, set aside, modified, or altered after the lapse of several terms of that court upon a mere petition supported by *ex-parte* affidavits, and upon notice to the adverse party. *Fries vs. Fries*, 291.
2. A decree is deemed to be enrolled as of the term at which it is passed, and a final decree cannot be opened after the expiration of such term, except upon bill of review. A proceeding by petition and *ex-parte* affidavit is not equivalent to a bill of review. *Ib.*
3. A final decree in a divorce suit in reference to alimony is not subject to alteration or revision on *ex-parte* affidavits, unless it is provided in such decree that either party be at liberty to apply thereafter to the court for a modification of such decree in respect to alimony. *Ib.*
4. Where testimony has been taken upon a matter not in the pleadings, and where there is no stipulation in regard to such matter, no decree should be made, but the parties should be left to pursue other remedies. *Offutt vs. King*, 312.
5. A motion for a new trial on the ground that the court erred in its charge to the jury, where the rulings complained of were not excepted to before verdict, nor even after, will be overruled. *Doddridge vs. Gaines*, 335.
6. The legal effect of an order that the motion for a new trial be heard at the general term in the first instance, is equivalent to a refusal of the presiding justice to entertain the motion upon his minutes of the trial; and the case can then only be heard at the general term upon a bill of exceptions to be settled by the justice. *Ib.*

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7. The motion may be made upon the minutes of the justice at the term at which the trial is had, and must be determined at the term in which it is made; otherwise, it will be regarded as denied or refused to be entertained. *Ib.*
 8. If a motion for a new trial be made on the ground that the verdict is against evidence or the damages excessive, and it is denied by the justice presiding or he orders it to be heard at the general term in the first instance, if the moving party desires the merits of his motion to be reviewed by the court in general term, he must prepare a case to be settled as prescribed by the rules of the court. *Ib.*
 9. An order granting a new trial upon either of the grounds mentioned in section 8 of the act organizing this court is not appealable, but the denial of these motions involves the merits of the suit, and an appeal then lies to the general term. *Ib.*
 10. The statute and rules in relation to what motions shall be heard at a special term and what shall be heard at a general term in the first instance, and also the distinction between enumerated and non-enumerated motions considered, and the proper construction of the provision of the statute, and the rules pronounced to be that no motion made to a court in special term can be heard at the general term, unless such motion involve the merits of the suit in which it is made. *Ib.*
 11. Where several instructions are refused, but the same points are fully given in other prayers that are allowed, there is no ground for exceptions. *Kimbro vs. First National Bank*, 415.
 12. The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress it before going into trial. *Claxton et al. vs. Adams*, 496.
 13. Where the notice to take a deposition is entitled in the cause, and the caption is the same as in the notice, it appears to be no valid objection to such deposition that the names of the parties are not again set forth, either in said notice or caption. *Ib.*
 14. Where a deposition was taken of a witness residing out of the District, it seems it will not be suppressed because the party offering it did not prove that the reasons for taking it continued to exist at the time it was offered. *Ib.*
 15. A demurrer which sets up matter of proof which would be a defense on the merits, is irregular in form and will be set aside. *Alexander vs. Willet et al.*, 564.
 16. A plea that the defendant is a petitioner in bankruptcy does not, in itself, operate as a stay of proceedings. A judgment in such case was recorded by the plaintiff April 6, 1871, and an attachment issued thereon the 2d day of March, 1874. *It was held*, that a motion to discharge such attachment on the ground that defendant had been adjudged a bankrupt came too late, the defendant having neglected to obtain a stay of proceedings, and having waited more than three years after the entry of the judgment. *First National Bank, &c., vs. Abner*, 590.

17. Where a final decree in an equity suit does not conform to the decision, the proper method to have such decree corrected is by motion for a rehearing. *Mercer vs. Mercer*, 655.
18. In a suit for a divorce the court can grant a rehearing for the purpose of conforming the decree to the decision at any time before the end of the next term, under the 87th Rule in Equity of this court. *Ib.*

PROMISSORY NOTES.

See USURY, 3, 6.

WITNESSES, 2.

MUNICIPAL VOUCHERS.

1. Where promissory notes are delivered by the makers in payment of an antecedent debt, it is not competent to prove by parol that the party to whom they were so delivered agreed to pay the same as they should respectively come to maturity. *Spofford et al. vs. Brown et al.*, 223.
2. The principle is affirmed that parol evidence will not be received to vary or contradict a written contract. *Ib.*
3. If a person takes a negotiable instrument for a valuable consideration before the same is due, and without notice of any equities existing between the original parties, his title is good; and in order to impeach that title, it must be proved that he had notice or knowledge of the facts constituting such equities at the time he obtained possession of the instrument. *Ib.*
4. The testimony showed that the payee named in a promissory note died in 1863, and that his widow acted for some time afterward as sole executrix of his will, and in that character indorsed the note to the plaintiff. *Held*, that, in order to enable plaintiff to maintain an action upon said note, it is necessary to produce and prove a will conferring authority upon such executrix to transfer such note absolutely as the property of the plaintiff. *Russell vs. Russell*, 263.
5. The fact that no such proof, when it could have been easily obtained, was produced, might well excite suspicion that there was a purpose in withholding it. *Ib.*
6. In order to constitute negotiability, a promissory note ought upon its face to be for the payment of a sum of money certain as to amount, so that an indorsee may maintain an action upon it in his own name. *Ib.*
7. A promissory note, dated at Detroit, in the State of Michigan, and payable there, for \$2,000, with interest at the rate of eight per cent., *with current exchange on New York*, is not for a sum certain and is therefore not a negotiable instrument. *Ib.*
8. The executrix indorsed the note in Alabama during the late war, and gave it to a messenger, who conveyed it through the military lines, and delivered it to the plaintiff at Leavenworth, in the State of Kansas, and there was no evidence to show that the indorsement

was not of a commercial character. *Held*, that the indorsement and transmission of the note was unlawful under the non-intercourse act of July 13, 1861, and passed no title to the plaintiff. *Ib.*

9. Under our statute, where the debtor has agreed in writing to pay interest exceeding six per cent. per annum, but not greater than ten till the maturity of his obligation, but the contract is silent as to any rate of interest beyond that period in case the debtor should be in default, no more than interest at the rate of six per cent. per annum can be recovered for the time subsequent to the maturity of the obligation. *Sullivan vs. Snell*, 585.
10. Where the defendant is the payee and first indorser on a series of promissory notes, and the plaintiff's name is used as second indorser and both became parties to the paper for the accommodation of the maker, if, upon notice of non-payment, the plaintiff takes up said notes, he may maintain an action against the said first indorser for the amount advanced on account of such payment. *Pomeroy vs. Clark et al.*, 606.
11. Where the notes in suit were given in renewal of other notes on which the plaintiff was first indorser and the defendant was second indorser, that circumstance will not change the liabilities of the parties on the notes taken up by the plaintiff, unless there was an agreement between themselves relating to such liability. *Ib.*

RAILROAD COMPANIES.

1. Where a through-line for transportation of passengers and freight is established by the owners of different railroads, the first carrier who receives fare for the whole route, and gives a through-check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line throughout the entire distance. *Croft vs. Baltimore and Ohio Railroad Company*, 492.
2. Where three companies constitute a through-line, and the fare received for through-tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability. *Ib.*
3. No other company can be sued for a loss unless such occurred on its own line. *Ib.*

RAILWAYS AS COMMON CARRIERS.

See COMMON CARRIER, 1, 2, 3.

1. The delivery of inanimate property on the platform of a railroad company, which is the usual place of receiving freight preparatory to shipment, and under an agreement previously made for the transportation of the same, is a sufficient delivery to charge the railroad company with liability as a common carrier. *Bowie vs. Baltimore and Ohio Railroad Company*, 94.

2. But where the property consists of race-horses, accompanied by the agent of the owner, assisted by other persons in the employment of the owner, three of whom are race-riders for the horses and who travel with and take care of them ; and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading it as he thought best, after having been requested by the railroad employes to place the horse under their control, the owner would not be entitled to recover for an injury to the horse sustained under such circumstances. *Ib.*
3. On the trial of an action for such injury where there is a conflict of testimony as to whether the agents of the road or those of the owner had charge of the horse when the accident occurred, it is erroneous to charge the jury that if the servants or agents of the owner refused obedience to the agents of the road, the latter would still be responsible for the injury, and that it is their duty, if they could not control the servants of the owner, to refuse transportation of the horses in order to escape such responsibility. *Ib.*
4. In an action against a railroad company as a common carrier, for an injury to living freight, a witness was not allowed to answer a question whether the freight had been in fact delivered to the defendant where the delivery was disputed, and other witnesses had stated the facts and circumstances relating to the delivery. *Bowie vs. Baltimore and Ohio Railroad Company*, 609.
5. Whether freight has been delivered to a common carrier so as to fix his responsibility is a mixed question of law and fact, and is usually shown by proving that the freight was sent to the place where it is the habit of the carrier to receive it, accompanied with notice to him that it is there for transportation. *Ib.*
6. Where a contract was entered into by which four horses were to be transported from Washington to Baltimore on the railroad of defendant, and the horses were to be accompanied by their grooms, and if the horses, in accordance with the agreement, were admitted to the inclosure where the defendant usually received such freight, and the defendant notified that they were there ; and if the process of loading them had been partially completed by the shipment of three of the horses with their grooms : *held*, that although the agents of both parties were engaged in such loading when the injury occurred, these facts would constitute a delivery of the animals. *Ib.*
7. Such an agreement is no waiver of the strict responsibility of the defendant as a common carrier, any further than it might be modified by the fact that persons were to be sent by the owner along with the property ; and if the property is injured through the negligence of the agents of the defendant, it is liable for the damage ; and if the injury was caused by the act or conduct of the owner's servants, the defendant would not be responsible. *Ib.*

REHEARING.

1. A party may demand a rehearing as a matter of right where four justices decide the question in any cause and the court is equally divided in opinion. And where the fifth judge takes no part in the decision on account of being interested in the question, the right of the party is the same. *Railway vs. Board of Public Works*, 119.
2. Where a final decree in an equity suit does not conform to the decision, the proper method to have such decree corrected is by motion for a rehearing. *Mercer vs. Mercer*, 655.
3. In a suit for a divorce the court can grant a rehearing for the purpose of conforming the decree to the decision at any time before the end of the next term, under the 87th Rule in Equity of this court. *Ib.*

RIGHT OF WAY.

See EASEMENT, 1.

SERVICE BY PUBLICATION.

1. Notice by publication to non-resident defendants does not confer jurisdiction over them of itself, but if the subject of the suit be properly lying within the jurisdiction of the court, a decree after such notice would bind such property. *Fraser et al. vs. Prather et al.*, 206.
2. Where a statute requires notice to non-residents to be given by publication, and a judgment or decree is passed affecting the property subject to the jurisdiction of the court without the publication of the required notice, the decree or judgment, though erroneous, is not void, and a purchaser at a sale under such decree or judgment would take a valid title although the judgment might afterward be reversed for its errors in a higher court. *Ib.*

SERVICE OF PROCESS.

See CORPORATION, 1.

WITNESSES, 3.

The privilege of a witness in attendance upon a congressional committee is not higher than that of a member of Congress; he may, therefore, be served with a summons as defendant in a suit commenced in this court. *Wilder vs. Welsh*, 566.

SLANDER.

1. On the trial of an action of slander the plaintiff must prove that the defendant uttered the words set out in the declaration, or expressions of substantially the same meaning. *Pollard vs. Lyon*, 296.
2. Words which if true would subject the plaintiff to an indictment for crime involving moral turpitude, are in themselves actionable without averment or proof of special damage. *Ib.*
3. Since the act of Maryland of 1749 removing the infliction of corporal punishment for fornication, and that of 1786 repealing all proceedings against that offense, words spoken of an unmarried woman imputing to her that act are not actionable in themselves. *Ib.*

4. When the words complained of in the declaration are not actionable, and no special circumstances are set up, and there is a verdict in favor of the plaintiff, the judgment will be arrested. *Ib.*

SPECIFIC PERFORMANCE.

See EQUITY, 9, 10.

1. Where a bill is filed to compel the defendant to perform a written memorandum for the sale of real property, and the defendant denies that he executed the alleged memorandum, but admits that the signature thereto is his, and the grantee who has assigned all his interest to other parties, who, in turn, have assigned to the complainant, denies that he ever purchased or agreed to purchase the premises, but admits that the agreement is in his handwriting and that the defendants signed it; and the same is corroborated by other circumstances, the law attaches a force to the writing which the evidence of the parties cannot overthrow, and the contract for the sale will be recognized and enforced. *Sanborn et al. vs. O'Donnoghue et al.*, 554.
2. The defendant, after making the memorandum, executed a deed of trust on the premises to secure the payment of the sum of \$4,000, and the trustee is a party to the suit; the complainants were decreed to bring the purchase-money into court to be applied, in the first instance, to the extinguishment of the trust-deed, and that defendant receive the balance, and that he execute a conveyance of the property. *Ib.*

STAMP ACT.

See DEED OF TRUST, 2.

STATUTES CITED AND EXPOUNDED.

- Act of Congress of February 27, 1801, in regard to civil jurisdiction of justices of the peace, 160.
- Acts of Congress on same subject of March 1, 1823 and February 22, 1867, 161.
- Act of Congress of March 3, 1803, for the relief of insolvent debtors, 602.
- Act of Congress of February 26, 1853, making assignments of claims against the United States void, 1.
- Act of Congress of June 19, 1860, to authorize divorces in the District of Columbia, 34.
- Act of Congress of July 22, 1860, to carry into effect certain treaties therein specified, 86.
- Act of Congress of February 2, 1859, in regard to mechanics' liens, 463.
- Act of Congress of August 6, 1861 and of July 17, 1862, in regard to confiscation, 73.
- Act of Congress of July 13, 1861, in regard to non-intercourse, 261.
- Act of Congress of July 2, 1862, about Union Pacific Railroad, 234.

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- Act of Congress of June 30, 1864, sections 333 and 371, in regard to stamp duties, 155.
- Act of Congress July 4, 1864, in regard to landlord and tenant, 345, 567.
- Act of Congress March 2, 1863, organizing this court, 241.
- Act of Congress of March 3, 1865, in regard to parties testifying, 507.
- Act of Congress of February 22, 1867, for punishment of crimes, 150.
- Act of Congress of April 10, 1869, regulating the rights of married women, 61, 480.
- Act of Congress of March 13, 1869, and of March 25, 1870, in regard to Baltimore and Potomac Railroad, 322.
- Act of Congress of July 21, 1870, relating to this court, 119.
- Act of Congress of January 17, 1870, creating the police court, 149, 469, 502.
- Act of Congress of 1870, in regard to patents, 375, 410, 459, 520, 531.
- Act of Congress of April 22, 1870, amending usury laws, 535, 144.
- Act of Congress of February 21, 1871, to provide a government for District of Columbia, 121, 175, 329, 433.
- Act of the legislative assembly of August 10, 1871, prescribing the mode of assessment, &c., 123.
- Act of the legislative assembly of June 25, 1873, providing for amendments in certain cases, 469.
- Act of legislative assembly of June 23, 1873, to regulate theaters, &c., 581.

MARYLAND AND BRITISH STATUTES IN FORCE IN THIS DISTRICT.

- Acts of Maryland assembly of 1749 and 1789, 296.
- Acts of Maryland assembly of 1720, chapter 24, section 2, 499.
- 13th Elizabeth, in regard to fraudulent conveyances, 275, 312.
- 29 Car. II, in regard to fraud and perjuries, 485.

STATUTE OF FRAUDS.

The plaintiff, who is a newspaper-carrier, alleges that a former proprietor of the Daily Morning Chronicle agreed to give him the exclusive right to sell and deliver that paper on a certain route in Washington; that such owner sold out to another person, and that defendant has succeeded to the ownership of the paper, and that he renewed the contract with both. He alleges performance, but claims that defendant broke the contract by refusing to deliver to him any more papers. *Held*, that the plaintiff could not maintain an action on said contract, for the reason that it is void for uncertainty and want of mutuality; also, for the reason that it is not alleged to be in writing or to be performed within a year, and is therefore void, within the fourth section of the statute of frauds. *Fallon vs. Chronicle Publishing Company*, 485.

TAX.

See EQUITY, 15.

1. It is now a well-settled principle that courts of equity will not interfere by injunction to restrain the enforcement or collection of a tax, upon a mere allegation that the tax is illegal or void. This principle proceeds on the ground that the party asking relief has an adequate remedy at law. *Harkness et al. vs. Board Public Works* 121.
2. The chancery jurisdiction will only interpose when the enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury, or where it would throw a cloud upon the title to real estate. *Ib.*
3. But where an assessment is void upon the record of the proceedings in making it, there can be no cloud upon title within the equity powers of this court, and it is only when the invalidity is to be proved outside of the record, that chancery will interpose its preventive remedies. *Ib.*
4. The principle of law that a purchaser at a tax-sale must prove the regularity of the proceedings from the beginning to the time of the sale, and that all the requirements of the statute have been complied with, has not been changed by the act of the legislative assembly in regard to the effect of a tax-deed. *Ib.*
5. Individual tax-payers whose property has been separately assessed have not that community of interest which will allow them to unite in a bill of complaint to restrain the collection of taxes alleged to be illegally assessed, on the ground of preventing a multiplicity of suits. *Ib.*
6. A court of equity will not interfere by injunction when the consequences which might ensue would be little less injurious than those to be prevented by this process. *Ib.*
7. A tax-deed is void where the advertisement of notice of sale contains no dollar-mark at the head of the column of figures. *Coombs vs. O'Neal*, 405.

TENDER.

See MUNICIPAL VOUCHERS, 1, 2.

TREASURY DRAFTS.

1. Where a draft was issued from the United States Treasury upon the First National Bank of Washington, which was a depository and financial agent of the Government, payable to the order of Kimbro, who was a married woman then living in Tennessee with her husband, and the draft was delivered by the Government to the agents of the payee, who had been employed to prosecute the claim against the United States, and the draft was cashed by a bank in Nashville, on a forged indorsement of the payee's name, and by it sent for col-

lection to a bank in New York, by whom it was forwarded to the drawee in Washington, who paid it: *held*, that such drawee was liable to the payee, although payment had not been demanded on her behalf until after said drawee had paid it, relying upon the indorsement as genuine; *held, also*, that the liability of the drawee was not released by the circumstance that, on paying the draft, it was transmitted to the Treasurer of the United States, who acted upon the indorsement as genuine, and gave full credit for the amount of such draft in the account of the bank; *held, further*, that the action would lie, notwithstanding the fact that the payee never had possession of the draft, and that it was on file in the Treasury Department when the demand of payment was made on behalf of said payee, and notwithstanding the fact that defendant, in paying said draft, upon such payee's indorsement, acted as the agent of the United States Government. *Kimbro, &c., vs. First National Bank*, 415.

2. Where evidence is introduced impeaching the genuineness of the supposed indorsement, it is competent to submit the paper to the jury to show that it had been issued by the Treasury Department, and to determine if the indorsement was a forgery. *Ib.*
3. The acknowledgment of a power of attorney before the clerk of a county court, with the seal of the court affixed, does not raise a presumption of law that the instrument was executed by the person mentioned in the certificate of said clerk. Where there is evidence tending to prove and disprove a valid execution, the question must be submitted to the jury upon all the facts. *Ib.*
4. If there is a valid execution of a power of attorney, it is a sufficient authority to the attorney to place the name of the payee on the back of the draft, and to receive the money thereon. Or, if the power of attorney was left in the hands of the attorney, to be used by him and he filled the blanks therein, and by that means placed the indorsement on the draft, it would be a good and valid utterance of the draft as against the payee, or those claiming under her. *Ib.*
5. If the husband, during his life-time, never reduced the draft to his possession, then, upon his death, it became absolutely the wife's property by survivorship; and if she has not waived her right thereto, the representative of the husband's estate has no interest in the cause of action. *Ib.*

TRUSTS.

1. Where all the purposes and conditions of a trust created by a will and codicil are exhausted, equity will distribute the estate among the devisees, who are also next of kin, although the period for the expiration of the trust has not arrived. *Coltman vs. Moore*, 197.
2. The court will not extend the trust further than is necessary to support those of its purposes which are valid in law. *Ib.*
3. The sale of real estate under a deed of trust, as a whole, when it is capable of being divided, and when serious injury has been occasioned by that way of selling, furnishes just ground for relief in a court of equity. *Hill vs. Shoemaker*, 305.

4. If the property has been consolidated and improved into a paper-mill, (after the deed was made,) with fixed machinery and water-power to operate the same, the sale will be set aside, if it is made without reference to this altered condition of the property. *Ib.*
5. In case of the sale of real property under a deed of trust, the purchaser, as matter of law, becomes vested with the title, and if the person who executed the trust-deed remains in possession of the premises, without any agreement to that effect, he becomes, by operation of the landlord and tenant act, tenant by sufferance to such purchaser, and, upon being notified to quit in thirty days, is liable to be turned out by proceedings under that statute. *Luchs vs. Jones*, 345.
6. Leased premises were used as a hotel, and the lessee executed trust-deeds on the furniture to secure the parties from whom he purchased and other creditors. Subsequently, the landlord accepted in lieu of the lessee another tenant, who bought out the lessee, and assumed the payment of all rent in arrear and of all liens upon the furniture. Upon the faith of this agreement, the tenant paid all the back rent, and the rent accruing for some time afterward, to the landlord; he also paid off a large portion of the claims secured by the deeds of trust. *Held*, that the balance due upon such trust-deeds had priority over the landlord's lien for rent, and that there was a change of tenantry as well as of property in the furniture. *White vs. Freedman's Bank*, 509.
7. A landlord will lose his lien by conduct which misleads bona-fide purchasers for valuable consideration. *Ib.*
8. Where trustees have moneys in their hands, claimed by a landlord upon his lien for rent, and by creditors having trust-deeds on the furniture on the rented premises, a bill of interpleader will be sustained when the fund is not sufficient to pay both. *Ib.*
9. A will devised fourteen lots of ground in the city of Washington, in trust, "for a site for the erection of a Hospital for Foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by act of Congress, as well for such hospital, and upon such incorporation upon further trust to grant and convey said trust-estate to the institution so incorporated, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivors of them or their successors in the trust; and if not so approved, then upon further trust to hold the said lots for the same purpose until a corporation shall be so created by act of Congress, and shall meet the approval of said trustees, &c., to whom full discretion is given in this behalf; and upon such approval in trust, to convey as aforesaid," &c. *Held*, that the devise was not void under the rule in regard to perpetuities, which has no application in case of a trust for charitable purposes, nor is the devise void on account of the uncertainty of its objects. *Ould vs. Washington Hospital for Foundlings*, 541.

10. The jurisdiction of the court over charitable trusts rests on ancient and well-settled grounds, independently of the statutes of 13 Elizabeth. *Ib.*
11. As the trustees are invested with absolute discretion, if even Congress should fail to create a corporation, or one acceptable to the trustees, or if the grant to the future corporation should be void, the trustees would hold the property themselves for the same purpose, and might erect the hospital. *Ib.*
12. As the taxes, charges, and assessments are directed to be paid by the executors out of the residue of the estate, it was contemplated that the corporation should be created during their life-time, and before the final settlement of the estate. The conveyance was, therefore, to be made within the period prescribed by the rule of perpetuities. *Ib.*

TRUSTEE.

1. It is an established principle in this court, that a trustee or agent, in respect of the sale of property, cannot become a purchaser, either himself or by the intervention of another party, without the most positive explanations as to the good faith and honesty of the transaction. *Stephens vs. Beall*, 38.

USURY.

1. A note made in the State of Pennsylvania is not invalidated by the laws of that State, though more than the legal rate of interest is contracted for. The excess over such legal rate is recoverable by the debtor; and, therefore, a note given in this District, in part payment of the principal of such a note, is to be governed by the usury laws of that State, and as such principal is a valid indebtedness in Pennsylvania, the renewal note given for its consideration is equally binding here. *Rhawn vs. Grant*, 31.
2. Where a span of horses and other chattels are conveyed, upon an agreement that the owner may repurchase the same within six months, upon paying the amount advanced, with two and a half per cent. per month for the use thereof: *held*, that the contract is usurious upon its face, and the agreement valid only for the actual sum advanced. *Starkweather vs. Prince*, 144.
3. In an action by the payee of a promissory note against the maker, the latter may be examined as a witness to prove the defense of usury. *Eastwood vs. Creecy*, 232.
4. The advance of money made by a building association to one of the stockholders upon the shares which he owns is not a loan of money, but a purchase of such stock, and is therefore not affected by usury, and an account rendered by the association in which such advance is charged as a loan is erroneous. *Pabst vs. Building Association*, 385.
5. A bill of exchange on three months, drawn in New York upon S. in the city of Washington, and by him accepted for the accommoda-

tion of the drawer, and returned to such drawer in New York, where he negotiated it, upon an agreement that the person making the discount should retain a sum greatly beyond the rate of interest allowed by the laws of that State, it was held, that the validity of the contract was to be determined by reference to the statute of New York, which declared a contract void when usurious, and that consequently the bill now in suit was void for that reason. *Galaudet vs. Sykes*, 489.

6. A note for \$500, with interest at the rate of ten per cent., made for the accommodation of the indorsers, and negotiated to the plaintiff for \$460, who was the first holder for value, with notice of its character, was held to be usurious under the 3d section of the act of Congress of April 22, 1870, and that plaintiff could recover no more than the amount he paid for the note without interest. *Sullivan vs. Snell et al.*, 585.

VARIANCE.

1. A declaration on a policy of life-insurance stated the consideration to be the payment of premiums quarterly. The policy proved at the trial was expressed to be in consideration of said premiums, and of the statements and declarations made in the application for the policy. Held, that the variance was not material. *Jacobs vs. National Life-Insurance Company*, 652.

VENDOR'S LIEN.

1. A bill in equity can be filed to enforce a vendors's lien for the purchase-money of land sold and conveyed, only when the complainant has obtained a judgment at law for the amount due; or when he avers in his bill such facts as will show that he cannot have a full, complete, and adequate remedy at law. *Ford et al. vs. Smith*, 592.
2. Where the answer sets up that there is no such averment in the bill, the court will entertain the question of jurisdiction at the hearing and dismiss the bill. *Ib.*
3. This principle is peculiarly appropriate in a case where the existence of the debt is disputed, and the conflict of testimony leaves it doubtful whether there is anything due. *Ib.*

VOLUNTARY CONVEYANCES.

1. A voluntary conveyance to a wife by a husband of the bulk of his property is void as against existing creditors. *Walter, &c., vs. Lane et al.*, 275.
2. There is a presumption of law and fact that the grantor in such a deed intends a fraud upon his creditors, and the mere declaration of the parties to such a transaction that they acted in good faith will not be sufficient to repel this inference. *Ib.*
3. As respects subsequent creditors, the conveyance is not void unless there is intentional fraud contemplated by the grantor in the creation of future debts. *Ib.*

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4. If, however, in a court of equity, a conveyance is set aside as being voluntary and fraudulent against existing creditors, the creditors whose debts have been contracted since the execution of such conveyance may come in and share in the benefit of the fund thus created. *Ib.*
 5. The statute of 13 Elizabeth in regard to frauds and perjuries is the law of this District, and declares all conveyances void which are made to defraud such creditors as the grantee is indebted to at the time; but in a case of actual fraud as respects subsequent creditors, the deed will also be declared void. *Ib.*
 6. If a voluntary conveyance be made with a view of becoming indebted, that fraudulent intent may be inferred from the fact that the grantor contracted debts immediately after he made it and has not paid them. *Ib.*
 7. When a person is indebted in a small amount, and has ample means, and is not embarrassed in his circumstances, he may make a gift in favor of his wife and children, and it cannot be impeached, for want of consideration, by his creditors. *Ib.*
 8. A deed of trust executed for the benefit of the grantor's wife and children, in consideration of love and affection, is not void on its face as to creditors by reason of a provision therein by which the grantor reserves to himself the right to sell and dispose of the trust-property as he shall deem most for the advantage of his said wife and children, and where the property, however varied, is to be in the name of the trustee for the benefit and use of the beneficiaries during such grantor's natural life, and at his death is to be equally divided among them. *Offutt et al. vs. King et al.*, 312.
 9. A voluntary conveyance is void as to existing creditors, but not as to subsequent creditors unless there is intentional fraud contemplated by the grantor in the creation of future debts. *Ib.*
 10. Where a person is indebted in a small amount and is doing a prosperous business and is not embarrassed in his circumstances, he may make a conveyance in favor of a wife and children, and it cannot be impeached for a want of consideration. Natural love and affection is a good and valid consideration in a deed from a parent to a child. *Ib.*
 11. A creditor may apply payments to any of the debts due him, in his discretion, where the debtor has failed to give any direction; and when he makes it, he cannot afterward change the application. Equity, however, will not permit an appropriation to be made by the creditors for the mere purpose of showing an apparent indebtedness at the date of a trust-deed, in order to raise a presumption that it was fraudulently executed by the debtor. *Ib.*
 12. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors. *Mitchell vs. Seitz*, 480.

13. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds, and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by funds which he had furnished. *Ib.*

WAGES.

See CONTRACT, 1.

WASHINGTON GAS-LIGHT COMPANY.

1. The Washington Gas-Light Company is authorized to use the streets of the city for the purpose of laying gas-pipes, but it is the duty of the company to perform the work so that other persons may receive no injury through the negligence of the company, or of its agents, in such use of the public streets. *Dillon vs. Washington Gas-Light Company*, 626.
2. Where an individual has received an injury by falling into a trench dug in a traveled street and imperfectly filled up, the company will not be relieved from liability therefor, although the work has been approved of and accepted by the officers of the District government. *Ib.*
3. It is the duty of the company to put the street in as good condition as it had previously been, and also to exercise a careful foresight so as to prevent any injury afterward which might be occasioned to the work by storms and rain-falls, and which would render the work dangerous to persons traveling on the street. *Ib.*

WILL.

1. In the interpretation of a will, the general purpose of the testator is to prevail. *Coltman et al. vs. Moore et al.*, 197.
2. Where all the purposes and conditions of a trust created by a will and codicil are exhausted, equity will distribute the estate among the devisees who are also next of kin, although the period for the expiration of the trust has not arrived. *Ib.*
3. The court will not extend the trust further than is necessary to support those of its purposes which are valid in law. *Ib.*
4. A power to sell real estate for the payment of debts and the education of children contained in a will, may be executed by a surviving executor, without reciting such power in the executing deed of conveyance; provided that the intent to execute the power is shown by the circumstances of the case. By the omission of the usual recitals in a deed that the grantor is a surviving executor, and that it was executed in pursuance of a power, such deed, though not in an approved form, is not for that reason void. *Coombs vs. O'Neal*, 405.
5. A will devised fourteen lots of ground in the city of Washington in trust "for a site for the erection of a Hospital for Foundlings, to be built and erected by any association, society, or institution that may

hereafter be incorporated by act of Congress, as and for such hospital, and upon such incorporation upon further trust to grant and convey said trust-estate to the institution so incorporated, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivors of them, or their successors in the trust; and if not so approved, then upon further trust to hold the said lots for the same purpose, until a corporation shall be so created by act of Congress, and shall meet the approval of said trustees, &c., to whom full discretion is given in this behalf; and upon such approval in trust, to convey as aforesaid," &c. *Held*, that the devise was not void under the rule in regard to perpetuities, which has no application in case of a trust for charitable purposes, nor is the devise void on account of the uncertainty of its objects. *Ould vs. Washington Hospital for Foundlings*, 541.

6. As the trustees are invested with absolute discretion, if even Congress should fail to create a corporation, or one acceptable to the trustees, or if the grant to the future corporation should be void, the trustees would hold the property themselves for the same purpose, and might erect the hospital. *Ib.*
7. As the taxes, charges, and assessments are directed to be paid by the executors out of the residue of the estate, it was contemplated that the corporation should be created during their life-time, and before the final settlement of the estate. The conveyance was therefore to be made within the period prescribed by the rule of perpetuities. *Ib.*

WITNESSES.

See PROMISSORY NOTES, 4, 5, 6, 7, 8.

EVIDENCE, 5.

1. If a party on cross-examination asks about a matter not stated in the direct examination, this court will not for that reason reverse the judgment when the bill of exceptions does not show the answer of the witness, or that it was improper or unfavorable to the party making the objection. *Eastwood vs. Creecy*, 232.
2. In an action by the payee of a promissory note against the maker, the latter may be examined as a witness to prove the defense of usury. *Ib.*
3. The privilege of a witness in attendance upon a congressional committee is not higher than that of a member of Congress; he may, therefore, be served with a summons as defendant in a suit commenced in this court. *Wilder vs. Welsh*, 566.
4. Testimony of witnesses tending to show an alteration in the name of the grantee in a conveyance of real property will not affect the validity of the deed when no such alteration appears upon its face, and when it is evident that the witnesses are laboring under an obvious and palpable mistake. *Tucker et al. vs. Ormes et al.*, 652.

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